THE

LAW OF PARTNERSHIP.

Six Lectures

DELIVERED IN THE OLD HALL, LINCOLN'S INN, DURING THE HILARY SITTINGS, 1899, AT THE REQUEST OF THE COUNCIL OF LEGAL EDUCATION.

BY

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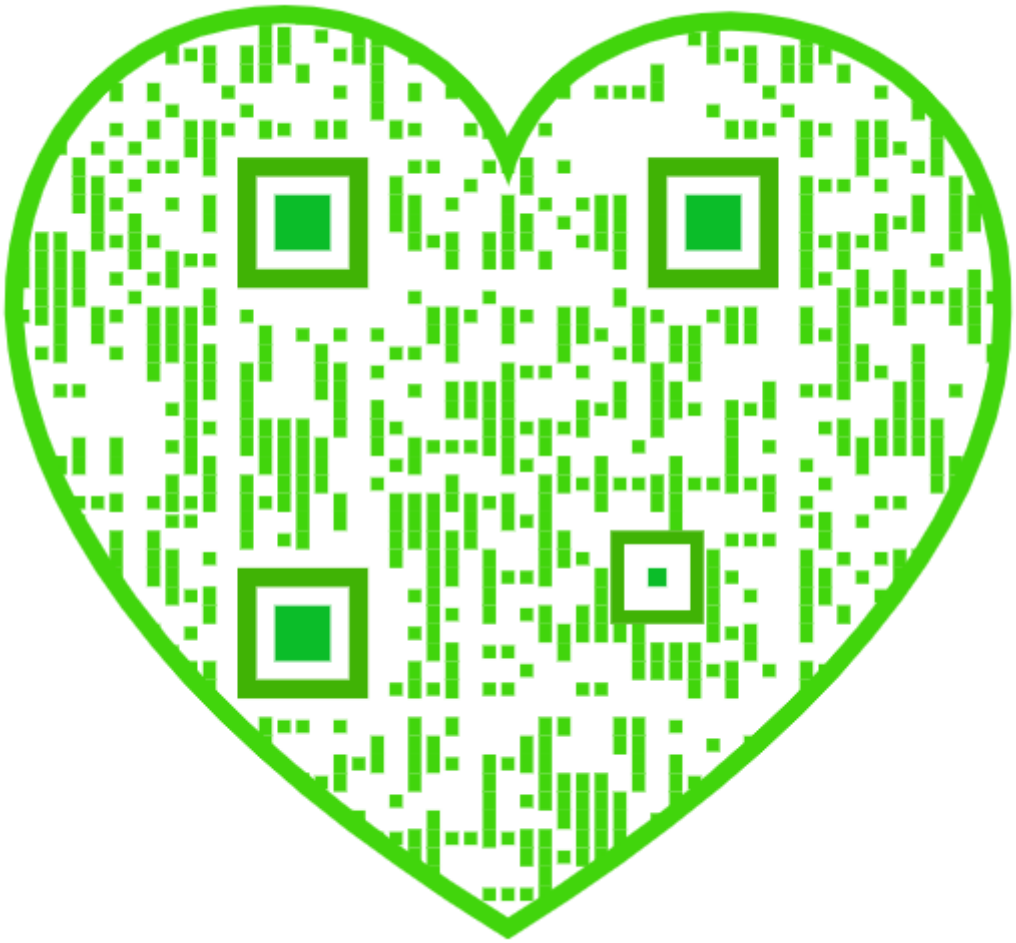

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PREFACE.

THESE lectures were delivered at the request of the Council of Legal Education, and as some (I fear too partial) friends, who were good enough to attend, expressed their approbation, I have ventured to print them.

This little work, of course, makes no pretence to the position of a text book; but it is hoped that law students and commercial men may find in it a readable, concise, and accurate view of the main principles of the law of partnerships.

For the convenience of those readers who desire to go deeper into the subject, a number of authorities have been referred to in the footnotes.

Need I make acknowledgment of my indebtedness to the Master of the Rolls, Sir NATHANIEL LINDLEY? It goes without saying. No one who ventures to express any opinion on partnership law can be otherwise than grateful for his monumental

work. Also, I wish to say how much assistance I have derived from Sir FREDERICK POLLOCK'S book on the subject, and from the very able and concise article of Mr. W. B. LINDLEY in that excellent compendium, the Encyclopædia of English Law.

A U.

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THE LAW OF PARTNERSHIP.

LECTURE I.

THE ESSENTIAL ELEMENTS OF PARTNERSHIP.

(1.) INTRODUCTORY.

THERE is probably no language which contains more ambiguous words than ours, and among these the word partner ranks high, designating as it does various things,—from the beams which support the masts of a ship to those radiant beings who share our sorrows, double our joys, and are said, by malicious and inaccurate bachelors, to treble our expenses. The traditions of this hall, however, lend themselves neither to nautical or matrimonial disquisitions, and in the course of these lectures I shall have to ask your attention to the unromantic and rather dry subject of that kind of partnership which, in the language of the first section of the Partnership Act, 1890 (by which the main principles of the law of partnership were codified), is the relation

which subsists between persons carrying on a business in common with a view of profit.

Now this definition is very neat and epigramatic, and, no doubt, puts the matter in a nutshell; but it is easier to concoct an epigram than to interpret it, and, as a witty and learned lord of appeal recently remarked, it is one thing to put a case in a nutshell and another to keep it there (*a*). You must not be surprised, therefore, or think me more prosy than the subject demands, if I devote the whole of this lecture to the consideration of the question—What is a partner? For it is a question of no mere academic interest, because if the relation of private partnership (*b*) exists, then whatever may be the arrangements between the partners *inter se* as to how the losses are to be borne, each partner will, as between himself and the creditors of the firm, be liable to the last farthing of his fortune.

The foundation of this rule is, in the words of that

(*a*) *Per* Lord MACNAGHTEN in *Foxwell* v. *Van Grutten*, [1897] A C. 658.

(*b*) I say a private partnership because these lectures do not relate to public companies, in which the liability of the shareholders is limited. Such companies are, no doubt, partnerships, but they are partnerships of a very special nature, governed by the provisions of special statutes, and expressly excluded from the provisions of the Partnership Act, 1890. Moreover, they have been already fully discussed far more ably than I could pretend to discuss them by my friend, Mr. Palmer. They are, therefore, not touched upon in this work.

great master of partnership law, the present Master of the Rolls, that each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern, and consequently is liable to the performance of all such contracts in the same manner as if entered into personally by himself. Therefore, if once the relation of partners is established between one who actively carries on a business and another who passively participates in the profits, the latter will become equally liable with the former for the debts and liabilities of the firm. Bearing this in mind, you will not fail to understand the immense importance of the subject of this evening's lecture.

(2.) Definition of Partner.

Most of you have heard the celebrated definition of an archdeacon, that he is a person who performs archideaconal functions; and I am afraid that I can give you no better definition of a partner. The present Master of the Rolls gives fifteen definitions, and the Partnership Act carefully abstains from giving one, but it would appear that the only safe definition is that a partner is a person who has entered into the relation of partnership, *i.e.*, (referring once more to the statutory definition of

partnership,) the relation which subsists between persons *carrying on a business with a view of profit.* Whether he has done so is a question of fact (and often a very difficult one), depending in each case upon the real intention of the parties, ascertained from the contents of the written instruments (if any) and from their conduct.

Let us examine the definition a little more closely. There are three essential facts, without which no partnership can exist according to our law. There must be (1) a business (2) carried on with a view of profit (3) by or on behalf of the alleged partners. Let us consider these three essentials separately.

(3.) There must be a "Business."

And first,—What is a "business"? It is not every occupation which can be said to be a business. For instance, a landowner whose income is derived from the rents of his property, does not carry on a business, although the management of his estate may be his only serious occupation, and may cause him to be an extremely busy man. Consequently, two joint owners of an estate or even of a chattel, such as a ship, are not (as such) partners, although they may use their best endeavours to develop the land and let or use the joint property for their mutual profit, unless they go further and carry on a business with respect to it. On similar principles,

the members of a society formed to purchase investments for the common benefit of the members (what are sometimes called trust companies) are not partners, because, as was pointed out by *James*, L.J., in *Smith* v. *Anderson*, 15 Ch. D. 247, nothing to be done by such societies "comes within the ordinary meaning of 'business,' any more than what is done by the trustees of a marriage settlement, who have large properties vested in them, and who have very extensive powers of disposing of the investments, changing the investments and selling them, and reinvesting in other investments according to their discretion and judgment." If, however, the owners of a ship do not merely let it, but use it in the business of carriers of goods and passengers, they become partners, at all events, *quâ* that business. And so, if a society were formed to *speculate* in investments, with a view to make profits by selling and buying again securities whenever, in the opinion of the management, the turn of the market should make it advisable to do so, then, no doubt (as was pointed out by *Cotton*, L.J., in the case just cited), a partnership would exist, because that would be a business,—a buying and selling of property with a view of profit as distinguished from joint or common ownership.

This view of the law has now received statutory sanction by section 2, sub-section (1) of the Act of

1890, by which it is enacted that "joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof" (*a*).

The refusal by our law to recognise as "partnerships" any community in property or the profits thereof, unless it be community in the carrying on of a "business," is peculiar, and is not followed by the laws of France and those other continental states whose laws are founded on the *Code Napoléon*. By that code, partnership is defined as a contract by which two or more persons agree to bring or put something in common with a view to share in the resulting profit. By Arts. 1837 to 1842, these partnerships are divided into *sociétés universelles* and *sociétés particulières*. *Sociétés universelles* (which have no counterpart in our law) are partnerships in which the partners bring into community all their existing property real and personal, and make themselves, as it were, tenants in common of it, or else

(*a*) On the other hand, mutual insurance clubs or mutual loan societies may constitute partnerships if their object is one which is recognised in commercial life as "business," notwithstanding that their dealings are limited to their own members. See and consider *Re Padstow, etc. Association*, 20 Ch. D. 137; *Jennings* v. *Hammond*, 9 Q B. D. 225; and *Ex parte Poppleton*, 14 Q. B. D. 379.

bring into community all the proceeds of their industry (*sociétés universelles de gains*). Even *sociétés particulières* are not restricted to businesses, for they may be formed for the purpose of bringing into community a particular property, or the profits of it, or even for the purpose of using a particular thing in common, none of which purposes would be recognised by our law as the subject of partnership; so that the only branch of partnership in the continental sense which we regard as such is that kind of *société particulière* which is formed (in the words of the code) "to carry out a particular enterprise or to exercise a particular trade or profession"

Business, then, being essential to partnership, what is it? The Act of 1890, s. 45, defines it rather vaguely as "including every trade, occupation, or profession." It is obvious, however, that we must take this with a grain of salt. For instance, it could not apply to the profession of a barrister, in which partnership is forbidden; nor (unless the former cases were intended to be overruled, which is not likely) to the occupation of a landowner, as distinguished from a farmer or a market gardener or the like. In fact, I apprehend that it must be limited to what are recognised among business men as commercial and professional businesses, *i.e.*, callings in which men hold themselves out as willing to sell to all comers goods or skilled assistance or other service.

(4.) The Business must be carried on for Profit.

Let us now proceed to the consideration of the second essential to partnership, viz., that the business must be one which is carried on "with a view of profit." Now by profit is meant *net* profit,—that is to say, the difference between the gross returns and the outgoings of the business. Thus where a publisher agrees to pay an author one-third of the gross sales of his book, that is not such a sharing of profits as would even *primâ facie* raise a presumption of partnership; and the same remark would apply to the letting of a theatre upon the terms of the owner receiving half the amount paid by the audience for their seats (*Lyon* v. *Knowles*, 3 B. & S. 556). Here, again, the legislature has confirmed the prior view of the courts by enacting (s. 2 (2)) that "the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have, or have not, a joint or common interest in any property from which the returns are derived."

(5.) The Business must be carried on by, or on behalf of the alleged Partners.

But even where we find that a business is being carried on with a view of profit, and that two or more persons share the net profits, it does not

necessarily follow that they are partners, unless the business is carried on by, or on behalf of both or all of them.

Now this was by no means always the view of the courts. It was at one time considered that the mere participation in the profits of a business *ipso facto* made the participant liable as a partner to third parties. That rule was laid down positively in *Waugh* v. *Carver*, 2 H. Bl. 235, on the principle that, by taking a part of the profits, a man withdraws from the creditors a part of the fund which is the proper security for the payment of their debts.

That rule, however, was an unsound one, and after being whittled away by several fine distinctions, was at last practically set aside by the House of Lords in the leading case of *Cox* v. *Hickman*, 8 H. L. C. 268. By that case it was decided that, although a right to participate in profits is a strong test of partnership, and that there may be cases where from such perception alone it will be inferred, yet whether that relation does or does not exist, must depend on the real intention and contract of the parties, and not upon that one term of it which provides for the participation in profits.

The rule in *Cox* v. *Hickman*, is probably still the law. I say probably, on the authority of Mr. Justice North, in *Davis* v. *Davis*, [1894] 1 Ch. 393; but the legislature has so muddled the question by the

language used in section 2 of the Partnership Act, 1890, that until the matter had been thoroughly thrashed out, it is impossible to be quite certain. In order, however, that I may throw some light on the meaning of the provisions of the 1890 Act, it is necessary to trace the history of the question from the date of the decision in *Cox* v. *Hickman*.

(6.) History of the Law as to Profit-sharing since Cox *v.* Hickman.

It would seem, then, that the effect of that decision was not fully appreciated by the profession; for Mr. (afterwards Chief) Justice Bovill, in the year 1865, introduced a Bill into Parliament, which subsequently became law as the 86th chapter of 28 & 29 Vict., but is better known to the profession as Bovill's Act. By the first section of this Act, it was enacted, that the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits from carrying on such trade or undertaking, shall not of itself constitute the lender a partner, or render him responsible as such. The second, third and fourth sections, contain similar

provisions with regard to the remuneration of agents by a share of the profits, the payment of annuities to the widows and children of deceased partners, and the receipt of a share of profits by one who has sold the goodwill of a business. The fifth section provided for the postponement of a lender or vendor of goodwill to the other creditors of the business, in the event of the owner of the business becoming insolvent

Now, if I have been so fortunate as to make myself understood in explaining the effect of the decision in *Cox* v. *Hickman*, you will see that Bovill's Act made but little difference to the common law, except so far as it postponed a lender or a vendor of goodwill to the ordinary trade creditors. On the other hand, it has been suggested that it had this effect, viz., that whereas at common law, participation in profits was not *conclusive* evidence of partnership, Bovill's Act made it not even *primâ facie* evidence, if the contract were one of those enumerated in the Act. However, that was not the view taken by the commercial community, or by many of those who advised them. The Act was popularly (but most inaccurately) called the "Limited Partnership Act." The notion spread abroad that it legalised a new species of statutory partnership similar to that which prevails in France, Belgium, Germany, Italy Russia, and

other continental states, under the name of *Sociétés en Commandite*, or fiduciary partnerships, in which there are active and dormant partners, the names of the former alone appearing before the public, and they alone being responsible for the debts and liabilities of the business, while the dormant partner provides capital, to the loss of which his liability is limited.

It is strange and, perhaps, regretable that this form of partnership has never been adopted by us, as I believe it has been in the United States of America. Probably it would have been, but for the fact that with us, it is now so easy to secure the same results by the formation of a small limited company. Anyhow, having regard to its prevalence abroad, the notion entertained by commercial men of the effect of Bovill's Act was, perhaps, natural enough.

But however natural this view of the Act may have been, it was erroneous; for all that Bovill's Act did was to declare that in certain cases the receipt of a share in the profits, or of interest varying with the profits, should not of itself constitute the receiver a partner. Consequently, it was held that although an agreement was expressed to be an agreement under that Act, and contained a declaration that the receiver of the profits should not be a partner, he would nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently

of the reference to the Act and the declaration, was to give him the rights, and impose on him the obligations of a partner: *i.e.*, I apprehend, if as between himself and the persons who carried on the business, he got the rights and agreed to accept the obligations usual in partnership agreements, then as between him and third parties he must bear the liabilities. In other words, you cannot be a partner, as between yourself and your co-partners, and at the same time get rid of the liability to third parties which is inseparable from the partnership relation. *Qui sensit commodum debet sentire et onus.*

However, so far as I know, that was not judicially decided for ten years, viz., until the case of *Syers* v. *Syers*, which went to the House of Lords, and is reported in 1 Appeal Cases, 175.

The facts there were, that A. borrowed 250*l.* from B., and at the same time signed a paper in the following words:—"In consideration of 250*l.* this day paid to me, I hereby undertake to execute a deed of co-partnership to you, for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act, of the 28 and 29 Vict. c. 86." It was held that notwithstanding the express reference to the statute, it did not apply; and in giving judgment, Lord Chelmsford, after reading the agreement, with the exception of the reference to the Act, said: "So far

the contract is perfectly clear in its terms; but then it goes on to provide that the deed, *i.e.*, the deed of partnership, is to be drawn up under the Limited Partnership Act. This reference to the Limited Partnership Act shows that the parties have misunderstood its provisions; they appear to have thought that there might be a deed of co-partnership in terms, but, if expressed to be drawn up under the Limited Partnership Act, that the person advancing the money would not be completely a partner, nor be responsible as such. But in order to bring a case within the Act, there must be a contract in writing, and according to my reading of the Act, the contract must on the face of it show that the transaction is a loan. Now, this contract, so far from stating that the agreement of the parties was for a loan, states the direct contrary. Its terms are in consideration of the sum of 250*l.* this day, not lent, but paid to me, I undertake to execute a deed of co-partnership, and the deed of co-partnership is to be drawn up under the Limited Partnership Act. But such a deed could not be so drawn, because the Act requires a contract in writing upon the footing of a loan, and there is no such contract between the parties."

Syers v. *Syers*, as I have said, only incidently decided the construction of the Act, but the question soon afterwards came directly before the

courts in the well-known and important case of *Pooley* v. *Driver*, 5 Ch. D. 458. In that case a partnership was entered into between two persons named Barrett and Hagen for fourteen years. The capital of the business was to consist of 30,000*l*., of which Barrett and Hagen were to find 20,000*l*., and the remaining 10,000*l*. was to be raised "by way of loan, under the Partnership (Bovill's) Act, 1865, in sums of 500*l*. each from persons willing to advance the same for the purposes of the partnership." The capital of 30,000*l*. was to be considered divided into 60 shares of 500*l*. each, of which 40 shares were to belong to Barrett and Hagen, and the remaining 20 were "to be appropriated to the persons so advancing by way of loan," in proportion to their advances. Consequently each advancer became entitled to a share in the capital of the business. The profits were to be similarly divided between Barrett and Hagen, and the persons making the advances. On the expiration or sooner determination of the partnership a general account was to be taken, and the two partners were first to repay the sums advanced by way of loan, and were then to divide the residue between them. In pursuance of this deed, several persons advanced money to Barrett and Hagen, and deeds were executed between Barrett and Hagen and the persons respectively making the advances. Such deeds were

all in the same form, and recited the partnership articles, and the fact that the lender had agreed to advance a sum of money by way of loan to enable Barrett and Hagen to carry on the business. They certainly contained a covenant by Barrett and Hagen to repay the amount advanced at the expiration or sooner determination of the partnership, but on the other hand, they also contained a covenant that Barrett and Hagen would in all things conform to the provisions of the partnership deed, and would allow the lender to inspect the accounts, and would pay him the proportion of the profits which his advance bore to the whole capital for the time being employed in the business. They also provided that on the expiration or sooner determination of the partnership, a final account should be taken and the lender paid his advance, together with a share of the profits, according to the above proportion; but, if on taking the balance of profit and loss on the entire term it should appear that he had been overpaid profits during the continuance of the loan, he should refund them.

Barrett and Hagen failed, and the lenders were sued by the creditors of the firm. The late Sir George Jessel, M.R., gave a most elaborate judgment, which I strongly advise you to read. After commenting on various definitions of partnership, his lordship said: "What is the effect of the Act? The Act

is this, that the advance of money must be by way of loan. Now what does that mean? I take it to mean this, that the person advancing must be a real lender, that the advance must not only profess to be by way of loan, but must be a real loan; and consequently you come back to the question whether the persons who enter into the contract of association are really in the position of creditor and debtor, or in the position of partners, or in the only third position which I think could be suggested, that of master and servant. But the Act does not decide that for you. You must decide that without the Act, and when you have decided that the relation is that of creditor and debtor, then all the Act does is this, it says that the creditor may take a share of the profits. But as I understand the law, as laid down by the higher authorities to which I have referred, if you have once decided that the parties are in the position of creditor and debtor you do not want the Act at all, because the inference of partnership derived from the mere taking a share of profits, not being irrebutable, is rebutted by your having come to the conclusion that they are in the position of debtor and creditor."

His lordship then proceeded, with what Sir Roger de Coverley would have called "laudable courtesy and pardonable insolence," to flay the author of the Act for his ignorance of the law, and then proceeded

to consider the facts. The judgment is far too long for me to quote *in extenso*, but it practically came to this, that having regard to the fact that Barrett and Hagen covenanted with the lender to observe the partnership deed in every particular (which would have been superfluous if the lenders were not partners), to the fact that the loan was to form part of the capital of the business, and that the lender became entitled to insist upon the capital being employed in the trade, and particularly having regard to the fact that the lenders proportion of profit was not a fixed proportion, but a proportion varying with the capital for the time being employed in the concern, and to a proviso in the deed providing for payment off of the loan if the creditor became bankrupt, and to the proviso for refunding to the firm any profits drawn out by the lender exceeding his proper share, and to the fact of the deed containing an arbitration clause (which is usual in partnership articles, but not usual in a mere loan agreement); having regard to all these circumstances, his lordship came to the conclusion that the true relation of the parties was that of dormant and active partners, and not of mere creditors and debtors. He did not rely on one provision or two provisions, but on the whole character of the transaction from beginning to end, which he characterised as an elaborate device and ingenious contrivance which failed to effect the purpose for which it was designed.

Pooley v. *Driver* was soon followed by the case of *Ex parte Tennant* (6 Ch. D. 303). In that case the arrangement was a very special one between a father and a son, who was about to become an underwriter at Lloyds, by which, in consideration of the father making the deposit and giving the guarantee required by Lloyds, the son covenanted to employ a particular agent, and to pay half the net profits to the father. The court considered that this was a simple case of debtor and creditor, and held that the father was not liable. You will not fail to perceive that in this case there were no provisions such as those in *Pooley* v. *Driver* usual in partnership deeds, but unusual in loan agreement; and perhaps it may also be added that having regard to the fact of the lender being the father of the borrower, a *bonâ fide* loan, without any idea of partnership, was a natural, and by no means extraordinary transaction.

This case was shortly afterwards followed by *Ex parte Delhasse* (7 Ch. D. 511). In that case an agreement was entered into between one Megevand of the first part, Schœppi of the second and Delhasse of the third, by which it was recited that Megevand and Schœppi had agreed to become partners upon the terms, conditions, and stipulations with each other, and with Delhasse therein contained. It then set out the provisions of the first section of the statute, and recited that in order to form and carry

on the said partnership business, Megevand and Schœppi had requested Delhasse to lend them the sum of 10,000*l.* for the purpose of investing the same in the business, which Delhasse had agreed to do upon the terms thereinafter contained. The agreement then contained various stipulations, the most important of which was that Megevand and Schœppi were not to be personally liable to Delhasse for the 10,000*l* which was to be liable for the debts of the firm. In fact Delhasse's only right would have been to have the partnership accounts taken, to have the business wound up, the debts paid, and then to have his 10,000*l.* paid out of the remaining assets.

James, L J., in giving judgment, after reading the agreement, and pointing out that apart from the declarations as to the application of the statute, the relation of the parties was that Megevand and Schœppi were active partners, each of them having the power of signing the name of the firm, and that Delhasse was the dormant moneyed partner who was to have all the rights against the other members of the firm which a dormant moneyed partner would have in respect of the capital of the business, proceeded as follows:—"But it is said that there are other provisions in the contract which prevent its having this operation, and which show clearly that the parties meant the relation of lender and borrower, and not the relation of partners to subsist

between them. And for that purpose reliance is placed on the recital of section 1 of the Act—the recital of the agreement for a loan, and the declaration in clause 4, that the 10,000*l.* is advanced by Delhasse to the other two by way of loan under that section, and that such advance does not and shall not be considered to render Delhasse a partner in the business. Can those words really control the rest of the agreement? Do they really show that the intention was not in truth that which it appears to be by all the other stipulations? To my mind it is quite clear that they do not. When you come to look at all the other stipulations, they are utterly inconsistent with the notion of a loan by the one to the other, so as to make the two personally liable in respect of it in any event, or under any circumstance whatever. The loan is said to be made to the two, but when you read the whole of the agreement together, it is impossible not to see that it was not a loan to the two upon their personal responsibility, by the person who is said to be the lender, but that it was a loan to the business which was to be carried on by the two for the benefit of themselves and him, and was to be repaid out of the business, and out of the business only, except in the case of loss, when the loss would have to be borne by the three in the proportions mentioned in the agreement. The use of the word 'lend,' and the reference to the Act, are,

in my opinion, a mere sham—a mere contrivance t evade the law of partnership; and I am of opinion that the agreement was in truth and in substance an agreement for a real partnership between all the parties."

Lord Justice *Thesiger* added: "Apart from the Act, the law applicable to the case has been laid down in tolerably distinct terms by the House of Lords in *Cox* v. *Hickman*; and it is perfectly true that the House of Lords in that case laid it down that the proposition that a participation in profits constitutes an invariable test of partnership, is not one that can be maintained. Lord *Cranworth* gives as the test, that which no doubt must now be taken as the proper test to be applied in all these cases, viz., that the real ground of liability as a partner is that the trade has been carried on by persons acting on behalf of the person whom it is attempted to make liable as partner. But in the very same page in which these words occur, Lord *Cranworth* says that the participation in profits is, in general, a sufficiently accurate test, and that the right of participation in profits affords cogent, often conclusive, evidence of a partnership. If that be so, it follows, as a logical consequence, that if in addition to participation in profits, the arrangement provides for a participation in losses, and also contains stipulations tantamount to the ordinary stipulations

which one would expect to find in the case of a dormant partner, it is an *à fortiori* reasoning in such a case in favour of a partnership." His lordship then went on to show that this conclusion was not negatived by the statute, because the statute only said that an advance of money by way of loan on the terms of sharing profits should not of itself constitute a partnership, whereas here the advance was not by way of loan, and, moreover, did not stand by itself.

The next case to which I shall call your attention is *Badeley* v. *The Consolidated Bank*, 38 Ch. D. 238.

I need not trouble you with the facts of that case, which were very complicated, but I will quote a few lines from the judgment of Lord Justice *Cotton*, who said: "What we have to consider is, whether the business in respect of which the question arises is or is not the business of the two persons alleged to be partners. . . . It is said that there are dicta of various judges, in various cases, that the participation in the profits may decide the question, or that it is *primâ facie* evidence of partnership. Undoubtedly, if one found that two persons were participating in the profits made by a business, and knew nothing more, one would say, how is this? If they participate in the profits as being jointly entitled to the profits, that, unless explained, would lead to the conclusion that the business is the joint

case was decided before the Act of 1890 was passed, but the Act seems to give effect to what was there laid down." He then read the judgment of *Cotton*, L.J., in *Badeley* v. *The Consolidated Bank*, and continued: "Adopting then the rule of law which was laid down before the Act, and which seems to me to be precisely what is intended by section 2 (3) of the Act, the receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in it, and if the matter stops there it is evidence upon which the court must act. But if there are other circumstances to be considered, they ought to be considered fairly together, not holding that a partnership is proved by the receipt of a share of profits unless it is rebutted by something else, but taking all the circumstances together, not attaching undue weight to any of them, but drawing an inference from the whole." It appears, therefore, that the effect of sub-section (3) is merely to declare the pre-existing law, viz., that sharing of profits without more, implies partnership; but if it is only one of several facts, then all the facts must be considered together, and no special weight be given to the fact of profit sharing. It seems strange, however, that the collective wisdom of the learned and eminent persons who considered the Bill in the committee stage in both Houses, should have so wrapped up this simple proposition of law that it requires a

knowledge of the cases previously decided on the subject to bring it to light.

But sub-section (3) of section 2 of the Act does not end here, neither do its difficulties, for it goes on (following the terms of Bovill's Act) to declare that in particular, the following facts shall not of themselves constitute partnership, viz. (to put the matter shortly and, for convenience, out of the order adopted in the Act):

(a.) The receipt of a debt out of accruing profits.

(b.) The receipt by a servant of a share of the profits by way of remuneration (*a*).

(c.) The receipt by the widow or child of a deceased partner of a portion of the profits by way of an annuity.

(d.) The receipt of a portion of the profits by the vendor of the goodwill of the business (*b*).

(e.) Last, and most important of all, the receipt of a share of profits, or of interest the rate of which varies with the profits, by a person who has advanced money to a person engaged in trade or undertaking under a contract in writing signed by or on behalf of all parties (*c*).

Now here we come to another difficulty, viz., did

(*a*) See *Ross* v. *Parkyns*, 20 Eq. 331.
(*b*) See *Hawkesley* v. *Outram*, [1892] 3 Ch. 359.
(*c*) See *Ex parte Jones*, [1896] 2 Q. B. 484.

the authors of the Act intend by the proviso "provided that the contract is in writing, and signed by or on behalf of all parties thereto," to enact or imply that where there is no written and signed contract, a lender who lends on the terms of receiving a share of the profits, or of receiving interest varying with the profits, is to be deemed a partner? Lord Justice *Smith*, in the recent case of *Re Fort*, [1897] 2 Q. B. 495, seemed to assume that this was the result of the Act, saying "if the benefit of the section is desired by the lender, then, under the proviso, the contract must be in writing" That observation was, however, only a dictum, and with great respect to the learned lord justice, cannot, it is conceived, be supported. No doubt it is difficult to give any meaning to the proviso unless its effect is such as that indicated by *Smith*, L.J., but if he be correct, it would follow that a person who never was a partner, but only a creditor, and with regard to whom the only scintilla of evidence of partnership is participation in profits, is, in the absence of a written and signed contract to be deemed a partner notwithstanding the express words of section 2 that the receipt of profits is not of itself sufficient. That, it is submitted, cannot possibly be the correct interpretation. What is the correct meaning to be given to the proviso as to the necessity of a written and signed contract, however, passes my ingenuity

(7) Lessons to be learnt from the Decisions on Profit Sharing.

And now having drawn your attention to the statutes and decisions, let us see whether we can deduce from them any practical guidance for advising prudent and acquisitive persons who desire to finance a business, and to receive a share of profits, without thereby becoming liable for the debts.

In the first place, it is quite clear that in each case which comes before us, we must put to ourselves the question—Do these persons honestly mean that this advance is to be a true loan, or do they mean that it is to be a contribution to a joint adventure? To such a question honestly put the answer will generally not be very doubtful. For although the judges warily decline to bind themselves to any authoritative definition of what will constitute two or more persons partners, yet the broad distinction between a loan and a contribution to a joint speculation is sufficiently marked. In the one case the lender is like a debenture holder in a company, he has no voice in the management of the business. No doubt he is interested in its well-being just as a debenture holder is interested in the well-being of the company whose bonds he holds, because its prosperity is his security; but the interest is the interest of a mortgagee, and not of a joint owner.

In the other case a contributor to a joint speculation is like a shareholder in a company. Even if he has no direct control over details, he has a right to prevent misuse of the business assets in which he has a joint property, and not merely a property in the profits. The question is a crucial one, because, as Lord *Halsbury*, in language both compendious and graceful, said in the case of *Adam* v. *Newbigging*, 13 App. Cas. 315, "if a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit and loss, no indirect expedient for enforcing control over the adventure, will prevent the substance and realty of the transaction being adjudged a partnership . . . and no phrasing of it by dexterous draftsmen will avail to avert the legal consequence of the contract" (*a*). In fact, as the French say, "*plus ça change plus c'est la meme chose.*"

You must therefore first satisfy yourself that there is a *bonâ fide* loan; and in considering that, remember that *a necessary consequence of a loan is*

(*a*) The student is referred to the following cases as affording examples of participation in profits without partnership, viz., *Bullen* v. *Sharpe*, L. R. 1 C. P. 86; *Holme* v. *Hammond*, L. R. 7 Ex. 218; *Ross* v. *Parkins*, 20 Eq. 331; *Kilshaw* v. *Jukes*, 3 B. & S. 847.

a personal liability on the part of the borrower to pay it. An arrangement (such as that in *Ex parte Delhasse*) by which the lender is only to be repaid out of the business, can therefore never be a loan, but must be a partnership.

Again, the lender must not take an interest in, or share of the capital *in specie*, because thereby he becomes jointly interested in capital and profits, or in other words becomes part owner of, *i.e.*, partner in the business itself. Nor must his share of the profits be in the proportion which his loan shall from time to time bear to the rest of the capital in the business; for that shows that he is not simply lending his money on the security of a share, *i.e.*, an aliquot and definite share of the profits, but is contributing it to a joint speculation in which he and the other speculators are to take the profits *pari passu.* A provision for the return by the lender of a proportion of the profits received by him in one year, in case of subsequent losses, would be almost certainly a mark of partnership; for no *bonâ fide* lender would ever assent to such a provision.

Tried by these tests, you will generally not find it a very difficult task to determine what is the real nature of the contemplated arrangement. But although you cannot by any amount of dexterity prevent a transaction which is in substance a partnership, having the consequences which are

incident to the partnership relation, you must never forget that you may very readily, by want of dexterity, make a transaction which is really and *bonâ fide* a loan, appear on the face of the document to be a partnership. Be careful, therefore, in drafting such documents, to avoid any reference to words usual in partnership agreements, such as "capital," "concern," "partnership," or the like. Moreover do not be too technical, and introduce clauses taken from partnership precedents, which the parties themselves would never dream of, but which you may think desirable, such as arbitration clauses and the like. All men are apt to be too technical, from lawyers down to undertakers, and we are all apt to ride our technicalities to death. For instance, one of the latter fraternity once said to a person who was paying the last tribute of respect, "I beg your pardon, sir, but the brother of the corpse wishes to speak to you" That was technicality carried to the extent of absurdity, but you may easily rival it in the drafting of legal documents. Do not, except under exceptional circumstances (such as those in *Badely* v. *The Consolidated Bank*), bind the borrower to employ the loan as part of the capital of the business. Such a proviso is very dangerous, and although where it is necessary in order to preserve the security, it will not of itself constitute the transaction of a partnership, it is (just as the

mere fact of participation in profits is) a somewhat congent circumstance, which might, when taken along with other circumstances, lead the court to conclude, as a matter of fact, that a partnership *inter se* was intended, in which event the liability to creditors of the firm would follow as a legal consequence.

By bearing these cautions in mind, you will, I think, avoid finding yourselves in the very mortifying position of having landed a client, whose intention was to be a *bonâ fide* lender, in the position of an apparently *malâ fide* partner, with all its consequent litigation, worry, and not improbable ruin.

LECTURE II.

THE CREATION OF A PARTNERSHIP.

(1.) Illegal Partnerships.

At common law there was no limit to the number of persons who might join together to carry on a business. Where, however, partners are numerous, it is obviously impossible that they should all be active participators in the management of the concern: too many cooks would infallibly spoil the partnership broth. It was therefore usual in such cases, long before the Companies Acts were passed, to confide the management to a small body of directors, who alone had the power of binding the firm. This was so, not only as between the partners *inter se*, but also (contrary to the ordinary rule) as against the creditors of the business, whenever the members were "too numerous to act" (*a*) as joint participators in the management. The exact meaning of "too numerous," however, remained undetermined; but the question is now practically obsolete, because, by section 4 of the Companies Act, 1862, no partnership is to be formed consisting of more than

(*a*) See *Greenwood's Case*, 3 D. M. & G., at p. 477.

ten persons for the purpose of carrying on the business of banking, or of more than twenty persons for the purpose of carrying on any other business having for its object the acquisition of gain, unless it be registered as a company under that Act. As companies so registered become corporations, and are governed by a code of their own, it follows that in private partnerships (to which alone these lectures refer) the number of partners is limited to ten in the case of banking firms, and twenty in the case of other businesses; and it seems probable that these numbers would not be considered too numerous to rebut the ordinary presumption that each partner (in the absence of express notice to the contrary) is the agent of the firm.

Private partnerships being, then, limited to these comparatively small associations, they are absolutely illegal if they exceed the statutory numbers. Moreover, a partnership may be illegal if formed for a purpose forbidden by law, or which is *contra bonos mores*, or against public policy. For instance, by the Solicitors Acts an unqualified person is forbidden to carry on business as a solicitor, and consequently a partnership between a solicitor and one who is not, to carry on sucha business is illegal (*b*). So a partnership formed for sharing the profits of a

(*b*) *Williams* v. *Jones*, 5 B. & C. 108 ; 29 Rev. Reps. 181.

gambling hell or a house of ill-fame, would clearly be illegal. In all such cases the court simply refuses to recognise that the partners have any rights against each other—it will not direct accounts to be taken, nor will it order one partner to contribute to the losses suffered by the other (*c*). Of course, however, this does not prevent innocent creditors of the illegal firm bringing an action against the members to recover a debt which is not tainted with illegality to the creditors' knowledge. For instance, a shipbuilder might sue them for the price of a ship which was intended to be used in the Red Sea slave trade, so long as he was not aware of the illegal object.

An amusing and instructive case relating to illegal partnerships, is *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496. There two "bookmakers" entered into partnership. One of them, the plaintiff, claimed an account of profits from the other, the defendant, who contended that having regard to the nature of the business, the partnership was illegal, and that no such relief could be obtained. Mr. Justice *Chitty*, in giving judgment, said:—

"The second defence, and by far the most important one, is that this partnership is an illegal one, being formed for a purpose forbidden by statute, although

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(*c*) *Scott* v. *Brown-Doering, McNab & Co.*, [1892] 2 Q. B. 724.

independently of the statute there would be no illegality. The statute relied on is the Betting Act, 1853. The first question that arises is this,—Is the business of bookmaking necessarily illegal? That is to say, must it necessarily be carried on in such a manner as to fall within the provisions of this statute? The answer to this question appears to me to be in the negative. The Gaming Act, 1845 (8 & 9 Vict. c. 109), did not make betting illegal, this statute, as is well known, merely avoided the wagering contract. A man may make a single bet or many bets, he may habitually bet, he may carry on a betting or bookmaker's business within this statute, provided the business as carried on by him does not fall within the prohibition of the Betting Act, 1853. That a betting business may be carried on without contravening the Betting Act, 1853, is, I think, shown from *Doggett* v. *Catterns* (*d*), where the habitual use of a spot in Hyde Park for the purpose of receiving deposits, to return a larger sum on the contingency of a particular horse winning a race, was held not to be the using of a 'place' for such purpose within the prohibition of the Betting Act, 1853. The next question, is whether the parties intended or contemplated that this partnership business should be carried on in a manner prohibited

(*d*) 19 C. B. (N.S.) 765.

by the statute. If they did, the partnership was illegal, even though nothing definite might have been said at the time the partnership contract was entered into, as to the mode of carrying on the business. As the partners were not the '*owners*, occupiers, or keepers' of any 'house, office, or room or other place,' it is plain that the case is not within section 1 of the Betting Act, 1853, the case made by the defendant turns on the third section, which prohibits *the use* of 'any house, office, room, or other place' for any of the purposes there mentioned. The plaintiff's evidence came to this: he said, that when he entered into the partnership, he contemplated that the business would be carried on in the ordinary way in which bookmakers usually carry on their business in Tattersall's enclosure at race meetings. He has been cross-examined for the purpose of showing that he had seen bookmakers in the enclosure, standing on boxes, which seem to be ingeniously contrived so as to collapse when the keen eye of authority happens to fall on the bookmaker, and he says he has not. The object of the box appears to be to elevate the bookmaker above the heads of ordinary persons, thus making him conspicuous, and also enabling him to be heard in what the defendant and his clerk described as the 'swell's enclosure.' On the plaintiff's evidence, it also appears that, by the rules of Tattersall's

enclosure, boxes or stools are not permitted to be brought in, and on this point there was no substantial controversy between the plaintiff and the defendant. It is practically admitted, that at English race meetings, the rules are against the bringing into the enclosure of these contrivances; but the defendant says that there are many bookmakers, who, by 'squaring'—a euphemistic term for bribing—the gate keeper, do manage to bring these contrivances into the enclosure, or, if this method fails, then they are smuggled in under a mackintosh, or some other article of clothing. The plaintiff's evidence was—and I see no reason to disbelieve him—that as he was previously acquainted with the defendant when he was a clerk to a bookmaker he mentioned, a box was not used; and he said that subsequently, at any rate at Liverpool, where he seems to have attended several meetings, the bookmakers do not stand on these boxes in the enclosure. The result of this evidence is, that though the defendant himself might in some instances have smuggled in this box into the enclosure, and used it for the purposes of betting, yet the plaintiff himself did not anticipate that this would be the mode of carrying on the partnership business. Now, to come back to the question I have to decide, Was it the intention of the parties that this betting business was to be carried on at a 'place' within the meaning

of the Betting Act, and did the plaintiff contemplate that it would be carried on by means contravening the rules of Tattersall's enclosure? If the defence is to succeed, I must find that the plaintiff did so intend. On this point the materiality of the use of the box is now evident, and the evidence of the plaintiff is important. I am satisfied on the evidence that some of the larger bookmakers, the 'big men' as the defendant called them, do carry on a bookmaking business in Tattersall's enclosure without violating the statute, though in many cases some other cunning bookmakers carry on their business in the way described by the defendant, so as to bring it within the cases that I have been referred to. On the evidence I hold that it has not been made out that the plaintiff did intend that this business should be carried on illegally, and, consequently, I decide that this second defence fails."

(2.) Personal Capacity.

Supposing a partnership is formed for a legal purpose, and with a legal number of partners, the next question which arises is as to the personal capacity of the partners.

Now, broadly speaking, every one (unless he be a convict or an alien enemy) is capable of being a

partner. But there are, nevertheless, certain classes of persons who, although capable of being partners, are to some extent exceptions to the general rule that each partner is liable for the debts of the firm. Lawyers have, time out of mind, with brutal frankness, treated of these persons under the one head of "lunatics, infants, and married women." Acting on the maxim "*place aux dames*," let us invert this order, and consider the case of the matrons first.

(A.) *Married women.*—Now with regard to these, perhaps some of you may think that they would be better employed in giving their whole time and attention to that domestic partnership for which nature has eminently fitted them, viz., the management of their homes, and the bringing up of their offspring. However, the law is not so grandmotherly as to restrict people to those callings for which they are best fitted, and it is clear (at all events since 1893) that every married woman is capable of entering into partnership either with her husband or with a stranger. This arises out of the joint operation of the Married Women's Property Acts, 1882 and 1893. By section 1 (2) of the Act of 1882 it was enacted that a married woman (without any limitation as to the date of her marriage) should be capable of entering into and rendering herself liable to the

extent of her separate property on any contract; but the courts held that this only applied where she had some separate property at the date of the contract. However, by the Act of 1893 (s. 1), this capacity to contract is no longer conditional upon her having some separate property at the date of the contract. Contractual capacity, therefore, is conferred on all married women; but, at the same time, their liability is strictly limited to their separate property, present or future, including property to which they may be possessed during widowhood. They are, in fact, under no personal liability, and no judgment can be obtained against a married woman personally, but only against her separate property (*e*); and not even against that, during coverture, if she be restrained from anticipation. To put the matter shortly, her property and not herself is liable, and it seems to follow (although so far as I know this has never been judicially decided) that an injunction cannot be obtained to enforce even a negative agreement entered into by a married woman (*f*). She may, however, be made a bankrupt, if she carries on a trade *separately from her*

(*e*) *Per* Lord *Esher*, M.R., *Re Lynes*, [1893] 2 Q. B. p. 115.

(*f*) See *de Francesco* v. *Barnum*, 43 Ch. D. 165, the case of an infant who had broken her apprenticeship indentures. The reasoning seems to be equally applicable to the case of a married woman who is not personally liable.

husband, in respect of her separate estate, under section 1 (5) of the Act of 1882. This liability remains even after the trade is abandoned, if the trade debts are not paid (*g*). Note, however, that she does not carry on trade "separately from her husband" (and therefore cannot be made bankrupt), where she carries it on *in partnership with him* (*h*). Note also, that if a married woman is to be made a bankrupt, it must be by some other form of procedure than a bankruptcy notice; as the statutory form of such a notice is not applicable to a judgment against a married woman's separate estate (*i*).

In addition to the powers of contracting conferred upon them by the Acts to which I have referred, there are a few exceptional cases in which a married woman could previously contract. Such cases occurred where the husband was a convict (*k*), or an alien enemy living abroad (*l*), or when, being the

(*g*) *Re Dagnall*, [1896] 2 Q. B. 407.

(*h*) *Re Helsby*, 63 L. J. Q. B. 261.

(*i*) *Re Lynes*, *ubi supra*; *Re Hewett*, [1895] 1 Q. B. 328. The same objection applies where the married woman trades alone under a firm name, and judgment is obtained against such firm (*Re Frances Handford & Co*, reported p. 3 of *Times*, 13th February, 1899).

(*k*) *Ex parte Franks*, 7 Bing. 762.

(*l*) *Barden* v. *Keverberg*, 2 M. & W. 61.

wife of a freeman of the City of London (*n*), she carried on trade there separately from him. In these cases it would appear that a married woman could be rendered personally liable. So in equity, where a married woman had property settled to her separate use, she could always enter into valid contracts with regard to it; but such contracts, like the statutory ones, were not enforceable against her personally. On the other hand, after a judicial separation, or after a protection order, a woman is regarded as *a feme sole* so far as her capacity to contract is concerned, and is therefore personally liable (*o*).

Generally you will see, that although a married woman is capable of entering into other partnerships besides that of marriage, she is not (unless possessed of large separate estate) a very desirable member of a trading firm; for while her rights as a participator in the profits are unlimited, her liability, both to her colleagues and to the creditors, are strictly confined to her separate estate which she is not restrained from anticipating.

As a learned but lively member of the Chancery

(*n*) *Beard* v. *Webb*, 2 B. & P. 93.

(*o*) 20 & 21 Vict. c. 85, ss. 25, 26, and 21 & 22 Vict. c. 108, ss. 6—10.

Bar, Mr. Cyprian Williams, has written in verse at once accurate and pithy:—

"Wives are *not* as single women, nor as men: their plight is better,—
For a wife, unless a trader, cannot make herself a debtor.
She shall not be sent to prison like a spinster or a man,
If she will not pay her judgment creditors, altho' she can.
She shall *not* be made a bankrupt (as may widow, maid, and male),
That is, not unless she carry on a separate trade and fail;
Wherefore bless, ye wives, the freedom, which to you the Act accords;
Bless the Parliamentary Draftsman, bless the Commons, bless the Lords;
Bless the Judges to whose wit ye owe the statutes' explanation,
Bless Lord Thurlow for the clause restraining wives' anticipation."

With regard to the effect of a partnership, where one of the partners is a married woman, it is apprehended that the rights of creditors, and of the other members of the firm, to have the assets of *the business* applied in payment of debts, is the same as in the case of an infant partner, to which I will now pass on.

(B.) *Infants.*—Now there are infants and infants, and although a child of tender years cannot, in the nature of things, conduct a business, many legal infants of eighteen to twenty-one are perfectly capable of doing so, and, as a matter of fact, there are many of such infant traders. But although infants do often carry on trades, they are dangerous people

to trust because they cannot be sued for trade debts, nor be made bankrupt (*p*). Well, that being so, what is the effect of a partnership between an adult and an infant? That question was lately discussed in the House of Lords in the case of *Lovell & Christmas* v. *Beauchamp* (*q*). It is an important question, because, as Lord *Ashbourne* dryly observed, "if the adult members of a partnership could evade liability because one of the partners was a minor, minors would be found in many partnerships"; in fact there would be a premium on minors if such a new career of usefulness were thrown open to them. This, however, is not so. Lord *Herschell*, in giving judgment, said, "I think it clear that there is nothing to prevent an infant trading or becoming partner with a trader, and that until his contract of partnership be disaffirmed he is a member of the trading firm. But it is equally clear that he cannot contract debts by such trading; although goods may be ordered for the firm he does not become a debtor in respect of them. The adult partner is, however, entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for, no part of them shall be received by the infant partner. And, if the proper steps are taken, this right of the adult

(*p*) *Ex parte Jones*, 18 Ch. D. 109.
(*q*) [1894] A. C. 607.

partner can be made available for the benefit of the creditors. It is also clear, that, even if there are circumstances under which an infant can be adjudicated bankrupt, or a receiving order may be lawfully obtained as a step towards such adjudication, he cannot be made subject to the bankrupt laws in respect of any debt contracted by the firm of which he is a partner" His lordship then proceeded to point out that, in such cases, the judgment should be either against the adult partner alone, or against the firm excepting the infant partner, and that under a judgment in either of those forms a receiving order might be obtained against the adult partners, and in the proceedings in bankruptcy the partnership assets might be made available for those who may have given credit to the firm.

If, on attaining twenty-one, an infant partner wishes to free himself from liability for future debts of the firm, he must determine the partnership at once, otherwise, the shield of infancy having been lost, his position as a *de facto* partner will make him equally liable with his co-partners. It will not, however, render him liable for debts contracted during his infancy (*r*). In this respect the Indian

(*r*) *Goode* v. *Harrison*, 5 B. & A. 147; 24 Rev. Reps. 307. As to an infant's right to recover a premium where he has derived no benefit from the partnership, and has repudiated it on coming of age, see judgment of *Stirling*, J., in *Hamilton* v. *Vaughan-Sherrin, etc. Co.*, [1894] 3 Ch. 589.

Contract Act is more severe on an infant than our common law; for, by section 248, it is enacted that "a person who has been admitted to the benefit of a partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice within a reasonable time of his repudiation of the partnership." In other respects the English law as to infant partners seems to be the same as the law of India.

According to the French, and some other continental codes, an infant of the age of eighteen is, with certain consents, able to carry on a trade so as to bind himself as if he were of age (*s*), and therefore it is apprehended he may become a partner in such a trade with all its liabilities. In other respects, the French law appears to be substantially the same as our own (*t*).

(c.) *Lunatics.*—With regard to lunatics, when a person enters into a contract (such as a contract of partnership) and afterwards alleges that he was insane at the time, and did not know what he was doing, and proves the allegation, the contract is nevertheless as binding on him in every respect, (whether it is executory or executed), as if he had

(*s*) Code de Commerce, Art. 2.
(*t*) See Code Civil, Art. 1124, 1125.

been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about (*u*). Lunacy is, therefore, not of itself a bar to entry into partnership; nor does the subsequent lunacy of a partner operate, like death, as an immediate dissolution of the partnership (*x*), although it is a ground for asking the court to decree a dissolution (*y*). However, the court will, pending the hearing of such an action, grant an injunction, in a proper case, restraining the lunatic from interfering in the business (*z*). How necessary this may be, is obvious, when you consider that a lunatic partner is quite capable of binding his co-partners by contracts entered into by him on their behalf, so long as the party with whom he contracts is unaware of his unsoundness of mind.

(3.) How far a Written Agreement is Required.

Having now considered the questions of the number of partners, and the exceptional privileges of infant, lunatic and married women partners, I

(*u*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599.
(*x*) *Jones* v. *Noy*, 2 M. & K. 125.
(*y*) Act of 1890, s. 35.
(*z*) *J.* v. *S.*, [1894] 3 Ch. 72.

propose to say a few words as to the form of the partnership agreement.

Now, with some few exceptions, there is no statute which requires such an agreement to be in writing. It is one of the many anomalies of our law that, whereas a contract for the sale of a cottage, or for a marriage portion, or for the sale of goods above 10*l.* in value where no money passes, must be in writing, and signed by the party to be charged, the agreement regulating a partnership in a business employing 1,000 workmen, and having a capital of 100,000*l.*, may be merely verbal. Of course, in practice, such contracts, where the business is large, are nearly always reduced into writing, and very generally the terms are embodied in a deed; but the law requires nothing of the kind, and the terms of a partnership may be proved by parol evidence, or even inferred from the course of dealing of the parties, and this notwithstanding that the partnership property consists of land, or that the object of the partnership is to deal with that land (*a*).

There are two exceptions to this, viz., (1) where the partnership is only to commence at a future date exceeding a year ahead; and (2) where the partnership is intended to last for more than a year, and

(*a*) *Forster* v. *Hale*, 5 Ves. 308; 4 Rev. Rep. 128; *Dale* v. *Hamilton*, 5 Ha. 369; 2 Ph. 266; *Cf. Caddick* v. *Skidmore*, 2 D. & J. 52.

nothing has been done in pursuance of the agreement. In both such cases, the fourth section of the Statute of Frauds applies, which you will remember requires contracts to be in writing and signed where they are not to be performed within a year. Please note, however, that in the case of a partnership exceeding a year in duration, the statute does not apply where the agreement has been partly performed. Consequently, when two or more persons have actually carried on a business in partnership under a mere verbal agreement, it is open to one of them to prove that the terms were that it should last for a definite term, notwithstanding that such term may exceed a year. The onus of proof, however, in such cases of course lies in the party who desires to prove the agreement, and where the evidence is conflicting he will presumably be defeated. The point arose in the case of *Burdon* v. *Barkus* (*b*). In that case a colliery lessee entered into partnership with his manager for working certain seams of coal. Twelve years afterwards, the old pits being useless, new pits were sunk at the partnership expense. Shortly afterwards the parties quarrelled, and the plaintiff (the lessee) gave notice to determine the partnership, treating it as a partnership at will. To this the defendant (the manager)

(*b*) 4 D. F. & J. 42.

objected, alleging that he entered into the partnership under a verbal agreement that it was to last during the whole of the term of the lease. It was held that verbal evidence of this was admissible, Lord Justice *Turner* saying: "The Statute of Frauds is relied upon by the plaintiff in answer to the defendant's case, but whatever the agreement may have been, *it has been part performed,* and we are bound therefore, as far as may be possible, to ascertain what that agreement was. In considering that question, it is to be observed that the *onus probandi* rests upon the defendant, not only because the agreement is set up by him, but because the plaintiff has the legal interest in these seams; and the effect of the agreement alleged being to constitute the plaintiff a trustee for the defendant, it must, of course, rest upon the defendant to prove that trust." The evidence being conflicting, the court held that the defendant had not proved his case, and that, consequently, the partnership was one at will only.

You see, therefore, that whatever latitude the law may allow, no person having any business wisdom would be content with a merely verbal arrangement, the onus of proving which would lie on him; and, therefore, partnership agreements (or articles of partnership as they are usually called) form a very important branch of conveyancing practice.

(4.) What Matters should be Settled by the Agreement.

The nature of such a document is a mutual agreement (or, if a deed, a mutual covenant) that the parties will carry on business in co-partnership on the terms thereinafter stated. These terms are then set forth in numbered paragraphs, or articles as they are usually called, and no small amount of skill is required in the preparation of these articles when they are (as they frequently are) complicated. Indeed, in no branch of drafting is the wise saying of Solomon, that "without counsel purposes are disappointed," more often justified.

Speaking broadly, such a document should provide for the following matters:

1. The nature of the business, the duration of the partnership, and the name of the firm.
2. How the capital is to be provided.
3. The banking account of the firm, and who is to sign cheques.
4. Outgoings and profits.
5. Management of business.
6. Accounts.
7. What is to happen on the death of a partner or the dissolution of the firm.
8. Provisions for the family of a deceased partner.
9. Arbitration clause.

I shall have occasion to refer to these several points, or some of them, in more detail in subsequent lectures, but it is convenient that I should, at this point, give you some reasons why the foregoing questions should be expressly dealt with by the agreement.

In the first place, then, speaking generally, although some of these points might be left to be dealt with by the law, instead of being made the subject of express stipulation between the parties, yet the latter is the better course to adopt even where the express agreement merely states that which the law would imply. As the present Master of the Rolls remarks(c), "In framing articles of partnership, it should always be remembered that they are intended for the guidance of persons who are not lawyers, and that it is therefore unwise to insert only such provisions as are necessary to exclude the operation of rules which apply when nothing to the contrary is said. The articles should be so drawn as to be a code of directions, to which the partners may refer as a guide in all their transactions, and upon which they may settle among themselves differences which may arise, without having recourse to the court."

(c) Lindley on Partnership, 6th ed., p. 412.

(5.) Reasons why above Matters should be Dealt With.

To descend from generalities to particulars, I will now say a word or two on each of the usual clauses.

(A.) *Nature of business.*—In the first place, then, the nature of the partnership business should be stated, because it is *that* business, and that only, which the partners agree to carry on, and with regard to which each partner is responsible for the acts of his co-partners. It is therefore in the highest degree desirable that there should be no possibility of dispute as to what constitutes the real business of the firm.

(B.) *Duration of partnership.*—With regard to the duration of the partnership, unless a definite term be named, the general rule (subject to an exception which I shall presently mention) is that the partnership lasts only during the will of the partners. That is an old rule of law, but it is now formulated in section 26 of the Act of 1890. Moreover, where a partnership entered into for a fixed term is continued after that term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will. This, again, is now declared by

section 27 of the 1890 Act; but it was always the law, as may be seen from the case of *Neilson* v. *The Mossend Co.* (*d*), where Lord *Watson* said, "When the members of a mercantile firm continue to trade as partners after the expiry of their original contract, without making any new agreement, that contract is held in law to be prolonged or renewed by tacit consent. The rule obtains in the case of many contracts besides that of partnership, and its legal effect is that all the stipulations and conditions of the original contract remain in force, in so far as these are not inconsistent with any implied term of the renewed contract. The main distinction between the old contract and the new in this case is, that the latter is a contract determinable at will. It is an implied term of such a contract, that each partner has the right to instantly dissolve the partnership whenever he thinks proper."

The exception to the rule that a partnership is a partnership at will in the absence of express stipulation, is the particular kind of partnership which is usually now called a syndicate. A syndicate is a partnership formed to carry out some one special financial or industrial project, as for instance, to purchase, develop, and sell a particular estate, or to erect and sell a particular building. Such partnerships

(*d*) 11 A. C. 298.

(in the absence of express stipulation) are considered by the court as intended to last until the termination of the adventure which is the subject of the partnership (*e*).

In France, if there be no agreement as to the duration of the partnership, it continues during the joint lives of the partners, unless it is formed for a specific work, when, like our syndicates, it ceases on the completion of such work (*f*).

(c.) *Firm name.*—With regard to the name under which the business is to be carried on and which is usually called with us the "firm name," and abroad the "*raison sociale*," partners may trade under any name they please, according to our law, whether it be a combination of their own several names or the names of others, or a name descriptive merely of their business, so long as they do not thereby fraudulently imply that their business is identical with some other competing one. Thus any person may use his own name for the purpose of trade, or may use any fancy name. If a man's name is Brown or Jones he is not compelled to carry on trade under the name of Brown

(*e*) See Act of 1890, s. 32, and *McClean* v. *Kennard*, L. R. 9 Ch. App. 336.

(*f*) Code Civil, Art. 1844.

or Jones, but may carry it on under any fancy name he chooses. He may trade as De Montmorentcy if it pleases him, or as the London Egg and Butter Guild. Moreover the mere fact of somebody else having the same name, and carrying on trade under that name, does not prevent another person from doing the same. If John Brown sells coals, another John Brown may sell potatoes, and there is no law to prevent him doing so. Again, nothing can be plainer than that if the first John Brown carried on business under the name not of John Brown, but of John Brown and Co., so might the second (*g*). Nay, more, Brown may, if so disposed, carry on business under the name, not his own, borne by some other person *so long as his doing so is not calculated to deceive the customers of the other person.* As *James*, L.J., said, in *Levy* v. *Walker* (*h*) : It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes in the course of any business that he chooses to carry on, is a right in the nature of a trade mark, that is to say, a man has a right to say you must not use a name, whether fictitious or real, you must not use a description, whether true or not, which is *intended to represent*, or, even

(*g*) *Per Jessel*, M.R., *Merchant Banking Co. of London* v. *Merchant Joint Stock Bank*, 9 Ch. D. p. 563.

(*h*) 10 C. D. p. 447.

although not intended, is *calculated* (*i*) to represent to the world that your business is my business, and so by a misstatement deprive me of the profits of the business which would otherwise come to me. That is the principle, and the sole principle, on which the court interferes. The court interferes solely for the purpose of protecting the owner of a trade or business from a wrongful invasion of that business by somebody else. It does not interfere to prevent the *world outside* from being misled into anything.

But where such knavish trick *is* apparent, the court will interfere to prevent persons trading even under their own proper names. There is the well known case of *Croft* v. *Day* (*k*), the case of Day and Martin, the well known makers of blacking in Holborn, in which there was no longer either a Day or a Martin, both being long since dead. Yet the plaintiffs, who then carried on that business deriving their title under the original firm, were held entitled to restrain a real "Day" and a real "Martin" from trading under the firm name of "Day and Martin" *as makers of blacking*; the reason for the injunction being that the name of "Day and Martin" had been adopted by the defendants for the fraudulent purpose of representing and holding out to the

(*i*) *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83.

(*k*) 7 Bea. 84.

public that they were the old and well known firm of that name.

You will have gathered from what I have said that the fact of a new trader carrying on business in the name of an old trader in the same line, is not of itself illegal, unless he is doing it for the fraudulent purpose of passing off his goods as the goods of his rival, or unless (according to the recent decision of the House of Lords in *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83), in the absence of fraudulent intention, it is evident that the effect will probably be that his goods will be purchased in mistake for the goods of his rival. Where the newcomer is not using his own name, that fact, of course, speaks for itself, and goes a long way to prove that he is acting *malâ fide*. *Mala fides* is not, however, essential in such a case if there is a high probability of the two firms being confounded (*l*). But where he is trading under his own name, and it happens that the old trader has a similar name, then the question becomes more difficult and the law more doubtful. In any case, where the evidence shows that the newcomer is deliberately making a false suggestion, an injunction will be granted (*m*). But where the evidence shows that

(*l*) *North Cheshire, etc. Co.* v. *Manchester, etc. Co. ubi supra.*

(*m*) *Per Turner*, L.J., in *Burgess* v. *Burgess*, 3 D. M. & G. 896; affirmed in *Turton* v. *Turton*, 42 Ch. D. 128; and *Tussaud* v.

there was no intention to deceive, although the effect will be in all probability to deceive, it seems questionable whether the recent House of Lords case above cited would apply so as to prevent the second comer trading under his own name.

Our law as to the freedom allowed in the choice of a firm name, differs widely from that of most continental states.

In France the *code de commerce* recognises three distinct kinds of partnerships, viz., *la société en nom collectif*, *la société en commandite* and *la société anonyme*. The first of these (*la société en nom collectif*) most nearly approaches to an ordinary English partnership, being defined by Article 20 as a partnership in which two or more persons agree to carry on business under a firm name (*raison sociale*). This firm name, however, must, by Article 21, be confined to the names of the partners. This rule also prevails in Italy, by section 105 of the Italian commercial code, while section 71 of the Russian commercial code renders it obligatory that the names of *all* the partners must figure in the firm name. *La société en commandite* is a species of partnership prevailing in every European country except our own, being, in effect, a partnership between

Tussaud, 44 *ib.* 678. See also *Levy* v. *Walker*, 10 Ch. D. 436; *Lewis* v. *Lewis*, 45 Ch. D. 281; *Saunders* v. *Sun, etc. Co.*, [1894] 1 Ch. 537; *Pinet et Cie* v. *Maison Louis Pinet*, [1898] 1 Ch. 179; and *Brinsmead* v. *Brinsmead*, 13 T. L. R. 3.

active and dormant partners, in which the latter are only responsible to creditors to the extent of the capital which they have subscribed or agreed to subscribe. In fact, it is very like the "limited partnerships" which (as I mentioned in my first lecture) commercial men erroneously imagined were created by Bovill's Act. These limited private partnerships, by the French, and I believe all other foreign codes, must have a firm name comprising one or more of the active and responsible partners, and excluding the names of the dormant and limited partners.

La société anonyme is the equivalent of our limited joint stock companies, and need not be further mentioned.

The German law differs somewhat from the French in this, that although it requires that no other names than those of partners shall in the first instance figure in the firm name of a *société en nom collectif*, yet a firm having been once legally constituted, the fact that the partners whose names form part of the firm name retire or die, or sell the business and goodwill to strangers, does not necessitate any change in the name (*n*).

(D.) *Firm not a distinct legal entity.*—But, although partners are permitted to trade under a firm name,

(*n*) Handelgeotzbuch, 17, 23, 24.

that does not, according to our law, make the firm a separate and distinct legal *persona* like a corporation. In Scotland, France, Italy, Germany, Belgium, and Russia, the firm *is* a distinct *persona*; but with us, I think that the firm name is merely recognised as a convenient symbol or shorthand form for collectively designating all the partners regarded as joint creditors or debtors, just as we use "a" and "b" in algebraic computations to designate known quantities which it would be inconvenient to specify at length. Partners may therefore contract in their firm name, and the contract will be construed, and take effect, as if the individual names of all the members of the firm were substituted throughout for that firm name.

At one time this was the only purpose for which the law recognised the firm name at all, so that a firm could not either sue or be sued by it, but all the partners had to be named in their proper names as plaintiffs or defendants (as the case might be). By Order 48A of the Rules of the Supreme Court, this has now been altered, and persons carrying on business within the jurisdiction may sue or be sued in the firm name at the date when the cause of action occurred. Where, however, plaintiffs so sue, they must, on demand in writing, furnish the defendants with the names and addresses of the partners; and where a firm is sued the partners must

enter appearance in their individual names. Judgment may also be given against the firm as such, and in that case execution may issue against the property of the partnership, or against the individual partners with the exception of any who were out of the jurisdiction when the writ was issued, and who have not appeared or been served with the writ within the jurisdiction, or made co-defendants in their own proper names,

These provisions also apply to actions between a firm and one or more of its members, and to actions between firms having one or more members in common, provided they carry on business within the jurisdiction; but no execution is to be issued in such actions without special leave.

From what I have just said, you will see that, although, as a matter of theory, our law still refuses to regard a firm as a distinct legal *persona*, yet for the practical purposes of contracting, suing, and being sued, the firm is now looked upon as a *quasi* independent entity.

(E.) *Capital and interest thereon.*—The proportions in which the capital is to be subscribed by the partners should be stated in the agreement, and if it is not subscribed equally, provision ought to be made for the payment of interest on capital before the net profits are divided. In the absence of such

a stipulation interest on capital is not allowed. The necessity of bearing in mind this question of interest on capital is obvious when one considers that there is no necessary inference that partners share profits in proportion to their respective amounts of capital. Suppose, for instance, that A. and B. agree to enter into partnership, A. being a clever and experienced buyer of foreign goods, but having little capital, whereas B., although destitute of technical experience, has the command of large capital. Under these circumstances it may be quite fair and proper although A. brings in only 1,000*l.* of capital, while B. subscribes 5,000*l.*, that the net profits should be divided equally. But nevertheless it is also just that before those profits are ascertained, each partner should receive interest on his capital, in other words that it should be regarded as a loan to the firm.

(F.) *Signature of cheques, etc.*—With regard to the banking account, the articles usually specify the bank, and also state that all cheques and moneys received on account of the firm shall forthwith be paid into the banking account. They generally, also, make some provision as to who is to sign cheques. In the absence of any agreement each partner can sign cheques on behalf of the firm. Where, however, an elderly man takes a young

partner, or, as often happens, promotes a clerk or employee to a share in the business, it is quite usual to stipulate that all cheques shall be signed by the senior partner.

(G.) *Division of profits.*—With regard to profits the inference of law is that they are to be equally divided. Where, therefore, this is not the intention, it is very necessary to specify the shares of the various partners. Moreover, as the profits are generally only divided once a year, or once every half year, some provision is usually made enabling the partners to draw out monthly sums for their current private expenses on account of future profits.

(H.) *Management of business.*—It is usual to specify, in well-drawn articles, whether all or some only of the partners are to have the management, and also that the partner or partners who are to manage the business shall give their whole time to it. In the absence of such stipulations, each partner is entitled to participate in the management, and is bound to attend diligently to business. It is also desirable, in order to prevent disputes, to specify what amount of holiday each shall be entitled to, and how each partner shall be entitled to select the season of his holiday. It is also usual in this part of the deed to insert a stipulation that no partner shall enter into contracts exceeding a

specified amount without the consent of all the other partners.

(I.) *Accounts.*—Well-drawn articles of partnership always provide for the keeping of regular accounts, and for an annual or sometimes semi-annual balance sheet. As to such provisions the present Master of the Rolls says (*p*) : "The object of taking partnership accounts is twofold, viz. (1) to show how the firm stands as regards strangers, and (2) to show how each partner stands toward the firm. The accounts, therefore, which the articles should require to be taken, should be such as will accomplish this twofold object. The articles should consequently provide not only for the keeping of proper books of account, and for the due entry therein of all receipts and payments, but also for the making up yearly of a general account showing the then assets and liabilities of the firm, and what is due to each partner in respect of his capital and share of profits, or what is due from him to the firm, as the case may be."

(J.) *Death or retirement of a partner.*—In the absence of special stipulation, the death of a partner operates as a complete dissolution of the firm, and necessitates its winding up. A moment's thought, however, will make it clear that this is very

(*p*) Lindley on Partnership, 6th ed., p. 421.

undesirable in most businesses, and absolutely ruinous in many cases, where a firm have got together a large and valuable connection, and in which that intangible, but very valuable asset called "goodwill," would vanish into air if the firm were liquidated in the usual way. In such cases it is usual and desirable to make provisions for continuing the firm as an artificial entity notwithstanding the death of one or more of the partners. Do not mistake me. I do not mean to suggest that you can make it a distinct legal entity. All that can be done is to provide that the business shall not be wound up, and that, instead, the surviving partner or partners shall continue to carry it on as partners together, the share of the deceased in the assets being ascertained in a specified way, and the amount being paid to his personal representatives in a specified manner. By this means, the continuity of the business is not disturbed, while the substantial interests of the representatives of the deceased partner are preserved.

In framing these clauses it is usual and convenient to provide that the last balance sheet, if taken at the date provided by the articles, shall be conclusive as to the amount of the share of the deceased in the assets, but that if from any cause such balance sheet shall not have been taken, then that the omission shall be remedied, the personal representatives of the

deceased joining with the surviving partners in taking the necessary account.

It is also a convenient plan to provide that the personal representatives of the deceased shall be entitled to some fixed allowance, or a rate of interest on capital, in lieu of current profits since the last balance sheet. If this be not done, it will be necessary to take an account of profits from the last balance sheet down to the death of the deceased.

What I have just said is merely an outline of the simplest form of arrangement in relation to the death of a member of a firm. There are, however, many other forms. Sometimes the personal representatives succeed to the share of the deceased as dormant partners. Sometimes an annuity is made payable to his widow or personal representatives out of the profits (which you will remember does not make the recipients partners). Sometimes there are provisions enabling the deceased to nominate a successor by his will, but in that case the articles should provide that such successor should be bound to execute a deed agreeing to be bound by the articles.

What I have just said in relation to provisions providing for the death of a partner, equally applies to the case of a partner who desires to retire from business.

(K.) *Arbitration.*—The final clause in articles of partnership is almost invariably an arbitration clause. Put shortly, the reason for such a clause is the proverbial one, that it is better to wash dirty linen at home. Nothing injures a business so much as the knowledge that the partners are in a state of litigation, and it is, consequently, well recognised that a tribunal of private arbitration is much wiser in the interests of all parties than the public courts.

On the continent they lay so much stress upon this, that, by the French commercial code and others founded upon it, partnership disputes must be always referred to arbitration, and if a party declines to name an arbitrator the Tribunal of Commerce will nominate one on his behalf.

Such are the clauses usual in English partnership deeds, and on a future occasion I shall draw your attention to the rights of the partners *inter se* so far as the partnership articles are silent.

LECTURE III.

THE RELATION OF PARTNERS TO PERSONS DEALING WITH THEM.

It is often said that the law of partnership is a branch of the law of principal and agent. Certainly, so far as the subject of this lecture is concerned, the statement is perfectly true; for the reason why the partners collectively are liable for the acts or defaults of each of them is that each partner is *primâ facie* the agent of the firm and of each of his co-partners (*a*).

It must not be imagined, however, that a partner can bind the firm to any engagement into which he may purport to enter on its behalf, any more than an ordinary agent can so bind his principal. In fact, like any other agent, he can only bind his principal (the firm) to the extent of his actual or apparent authority.

(1.) Test of Liability is the Apparent as Distinguished from the Actual Authority.

Now actual authority does not necessarily mean express authority. It no doubt includes all express

(*a*) Act of 1890, s. 5.

authorities in cases where there are any, but in every case it includes that general authority with which, in the absence of express prohibition, the law clothes every partner to do all acts necessary or proper for carrying on the firm's business in the way usual in businesses of a like nature.

Now in many firms none of these acts are prohibited, and in such cases the actual authority of each partner is, at least, as great as his ostensible or apparent authority. But, on the other hand, it is quite common to find partnership agreements in which the individual partners, or some of them, are expressly prohibited from doing certain acts. For instance, nothing is more usual than to find a clause prohibiting a partner from buying, ordering, or contracting for any goods or articles for the use of the firm exceeding a certain value without the consent in writing of the other partners. In such cases the actual authority is less than the ostensible or apparent authority, and if a partner does a prohibited act—exceeds his actual authority in fact—the question at once arises whether what he has done was within his ostensible or apparent authority or not. If it was, then, although it was expressly forbidden by the partnership agreement, the firm will be bound, unless the person who dealt with the partner knew of the prohibition; for if he knew of the prohibition it goes without saying that the firm

will not be bound. In that case, so far from having apparent authority, it would be apparent that he had none. Indeed, section 8 of the Act of 1890 is explicit on this point.

Now what is the principle on which this doctrine of ostensible or apparent authority as distinguished from actual authority depends? In my opinion, it is a deduction from the doctrine of estoppel by conduct, viz., that if a man so conducts his business as to mislead others he must bear the consequences. Therefore if one employs another to transact a particular class of business for him, he is estopped from denying that the agent had authority to do any acts which are usually ancillary to the transaction of that class of business. In short, a principal must not blow hot and cold. He must not mislead innocent third parties by holding out another as his agent in relation to the conduct of a business, and then, when a particular transaction does not suit him, repudiate the agency on the ground that in details the agent has exceeded or disobeyed his instructions. For instance, where a man employs an agent to sell goods, he cannot repudiate a sale on the ground that the agent has sold for less than a minimum price in disobedience to his orders, or on the ground that the sale was made for credit contrary to express instructions.

Now if (as I apprehend) the principle of the doctrine

as to ostensible authority *depends on the third party having been misled*, it would follow that where he was not misled (as, for instance, in the case of sleeping partnerships, where the third party thinks that the party with whom he deals is, in fact, the sole principal, and therefore does not give credit to the real principal) the latter will not be liable if the ostensible partner has exceeded his actual authority. I myself believe that to be a correct statement of the law of agency generally, and certainly it now is so with regard to the agency of partners. But I am bound to say that it is inconsistent with a decision of the Queen's Bench Division in the recent case of *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, in which Mr. Justice *Wills* (with the concurrence of the late Lord *Coleridge*) laid it down that in the case of a dormant partner *no limitation of authority* as between the dormant and the active partner will avail the dormant partner as to things within the ordinary authority of a partner. His lordship's attention does not seem, however, to have been called to section 5 of the Act of 1890, which, I apprehend, is only declaratory of the previous law. By that section it is declared that "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on, in the usual way, business of the kind carried on by the

firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner." The dictum of Mr. Justice *Wills* seems to be quite inconsistent with this section, and, as the decision is questioned by the present Master of the Rolls, I venture to think that it is erroneous.

(2.) What Acts are within the apparent Authority of a Partner.

The power of a partner to bind the firm being limited to his actual or ostensible authority, the practical result is, that whenever a question arises as to whether the firm is bound by the act of a partner, the question at once arises, was the act one which, in the absence of notice to the contrary, a third person would be justified in regarding as within the ostensible or apparent authority of each of the partners? If that question be answered in the affirmative, then the question of actual authority is immaterial. Let us then consider what acts are within the ostensible authority of a partner.

(A.) *The Act must be done in relation to the partnership business.*—Now, in the first place, in

order to bind the firm, the act must be one done in relation to the partnership business. If A. and B. carry on business as butchers, a contract signed by A. in the firm name to supply furniture would not be binding on B. unless made with his express authority. By the mere fact of taking him as a partner B. never made A. his agent for such a purpose either actually or ostensibly. For the business is actually and also ostensibly that of a butcher, and not that of a furnisher, and a third party cannot reasonably assume that in such a case a partner has authority to pledge the firm to a transaction which is altogether foreign to its ostensible one. This rule of law is summed up in section 7 of the Act of 1890 as follows: "Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by any individual partner." It is apprehended that this last proviso is intended to meet the case of A., one of several partners, A., B., C., and D. having so acted as to mislead the third party into the belief that B. had the authority of the firm to enter into a contract on their behalf, or of A. having given B. actual authority to bind him (A.).

(B.) *Must be act for carrying on business in the usual way.*—The matter is fairly simple where the act in question is obviously one foreign to the usual business of the firm. The difficulty arises when the act, although plainly done in relation to the partnership business (for instance, referring a dispute between the firm and the third party to arbitration), is alleged by the firm to be one which was not within the ostensible authority of a single partner.

Now the 5th section of the Act of 1890 does not give one much assistance here, for it merely describes the acts which a partner has ostensible authority to do, as acts "for carrying on *in the usual way* business of the kind carried on by the firm." It is therefore necessary still to examine the authorities prior to 1890, to see whether they throw any light on the question, what are acts for carrying on the business in the usual way. The Privy Council case of *Bank of Australasia* v. *Breillat* (*b*), 6 Moo. P. C. 193, is, I think, the leading authority as to this, and it was there broadly laid down that in the absence of express prohibition, the actual authority (and therefore, in the absence of notice of any such prohibition, the ostensible or apparent authority) of a partner in a *general commercial* partnership, extends to pledging (*c*)

(*b*) 6 Moo. P. C. p. 193.

(*c*) *Ex parte Bonbonus*, 8 Ves. 540 ; *Butchart* v. *Dresser*, 4 De G. M. & G. 542.

and selling (*d*) the partnership goods, buying goods on account of the firm (*e*), borrowing money (*f*), contracting debts, and paying debts on its account, and drawing, making, signing, indorsing, accepting, transfering, negotiating, and procuring the discounting of negotiable instruments. In addition to these acts, a partner may engage servants for the firm's business (*g*), may receive, and give good receipts for debts due to the firm (*h*), and may (according to the best authorities) probably create an equitable mortgage of the firm's lands or buildings by a simple deposit of deeds (*i*). He may also probably retain a solicitor to conduct an action for recovering debts due to the firm (*k*). Where, however, the business is not of a commercial nature, (*e.g.*, where it is a professional business (*l*), or even the business of a farmer (*m*), or a quarry worker (*n*),

(*d*) *Dore* v. *Wilkinson*, 2 Stark. 287.

(*e*) *Bond* v. *Gibson*, 1 Camp. N. P. 185; 10 Rev. Reps. 665.

(*f*) *Lane* v. *Williams*, 2 Vern. 277.

(*g*) *Beckham* v. *Drake*, 9 M. & W. 79.

(*h*) *Porter* v. *Taylor*, 6 M. & S. 156; 18 Rev. Reps. 338; *Stead* v. *Salt*, 3 Bing p. 103; 28 Rev. Reps. p. 603.

(*i*) Lindley, 6th ed., 152; and see *Re Clough*, 31 Ch. D. 324.

(*k*) *Court* v. *Berlin*, [1897] 2 Q. B. 396; and see, also, *Underwood* v. *Lewis*, [1894] 2 Q. B. 306, or for defending an action, *Tomlinson* v. *Broadsmith*, [1896] 1 Q. B. 386.

(*l*) *Hedley* v. *Bainbridge*, 3 A. & E. (N.S.) 316.

(*m*) *Greenslade* v. *Dower*, 7 B. & C. 635; 31 Rev. Reps. 272.

(*n*) *Thicknesse* v. *Bromilow*, 2 Cr. & J. 425.

where there is no buying and selling of goods) he cannot accept, make, or issue negotiable instruments (other than ordinary cheques) (*o*), nor borrow or pledge the partnership property. In no case, whether the business be commercial or non-commercial, has a partner ostensible authority to do any of the following acts: He cannot execute a deed (*p*) (*e.g.*, a legal mortgage) on behalf of the firm; for an agent cannot bind his principal by deed unless his authority to do so is *expressly* conferred by deed (*q*); nor can he give a guarantee in the firm name (unless a trade custom be proved) (*r*); nor submit a dispute to arbitration (*s*); nor accept property (*e.g.*, fully paid up shares in a company) (*t*) in lieu of money in liquidation of a debt due to the partnership; nor make his partners, partners in another business (*u*); nor authorise a third person to make use of the name of the firm in legal or other proceedings (*v*).

(*o*) *Laws* v. *Rand*, 3 C. B. (N.S.) 442; *Forster* v. *Mackreth*, L. R. 2 Ex. 163.

(*p*) *Harrison* v. *Jackson*, 7 T. R. 207; 4 Rev. Reps. 422.

(*q*) *Berkeley* v. *Hardy*, 5 B. & C. 355; 29 Rev. Reps. 261; *Harrison* v. *Jackson*, 7 T. R. 207; 4 Rev. Reps. 422.

(*r*) *Brettel* v. *Williams*, 4 Ex. 623.

(*s*) *Stead* v. *Salt*, *supra*; *Adams* v. *Bankart*, 1 C. M. & R. 681.

(*t*) *Niemann* v. *Niemann*, 43 Ch. D. 198.

(*u*) *Singleton* v. *Knight*, 13 A. C. 788.

(*x*) *Marsh* v. *Joseph*, [1897] 1 Ch. p. 213.

(c.) *Must be an act done quâ partner, and not quâ individual.*—Well now, assuming that a member of a firm has entered into a contract with a third party, in relation to a matter which is within the scope of the partnership business, and is within the scope of his actual or ostensible authority, does such a contract necessarily bind the firm? The answer is—no, not unless he entered into the contract in his character as a partner. It is conceivable that he may have entered into the contract as principal and not as an agent for the firm, and in such case the firm will not be liable. But, of course, if the partner entered into the contract in the firm name, or in relation to the firm business, no doubt could be entertained that he contracted as agent for the firm. Indeed it is enacted by the 6th section of the Act of 1890, that, "An act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners. Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments."

(3.) Liability for Torts.

So far we have been considering the liability of a firm for the contracts or engagements entered into

by one of its partners on its behalf. However, the liability does not end there, for a firm, and each of its members, is also liable for the torts of one of the partners if committed in the ordinary course of the firm's business, but not for torts committed by him outside the scope of his apparent and ostensible authority as partner. The law on this subject is not perhaps very easy to understand, and certainly it is very difficult to explain orally, but I may perhaps make it easier by pointing out that the liability of a firm for the tortious acts of a partner rests on precisely the same principles as the liability of a master for the tortious acts of his servants, inasmuch as both are merely branches of the law of principal and agent.

So far as partnership is concerned, the principle is now stated authoritatively in the 10th and 11th sections of the Act of 1890, in the following words:

"10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting, or omitting to act (*a*).

"11. In the following cases; namely—

"(a.) Where one partner acting within the scope of his apparent authority receives the money

(*a*) See *Moore* v. *Knight*, [1891] 1 Ch. 547.

or property of a third person and misapplies it; and

"(b.) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

"the firm is liable to make good the loss."

(A.) *Liability for torts other than fraudulent misappropriations.*—Let us consider these in detail. You will perceive that section 10 refers to ordinary torts and section 11 to specific torts in the nature of fraudulent misappropriations of property. With regard to section 10, in order to render the firm liable, the tort must be a wrongful act or omission of a partner—committed or made, either (1) with the authority of his co-partners, or (2) in the ordinary course of the firm's business. If, therefore, it was committed or made without the actual authority of the co-partners, and outside the scope of the partner's ostensible authority, the firm will not be liable any more than it would be for a contract entered into under similar circumstances.

Now perhaps some of you may at first fail to understand how any wrongful act, which is not authorised by the other members of the firm, can fall within the scope of a partner's ostensible authority.

Can the law assume, in the absence of evidence, that an individual partner had apparent or ostensible authority to commit a tort on behalf of the firm of which he is a member, especially where (as sometimes happens) the tort is also a crime? No doubt that view has occurred to many generations of students when studying our law of torts, but the answer is, that although, no doubt, the firm cannot be assumed to have given one of its members authority to commit a wrong, yet, where it has given him actual or ostensible authority to do a class of acts on its behalf, it is liable for his tort either in the manner of doing such acts, or in doing them under circumstances in which they ought not to have been done at all. Thus (to take the analogy of the law of master and servant), a master is liable if his coachman, in the course of his employment, carelessly drives over a pedestrian; or if his workman negligently drops a stone from a scaffold on to a bystander. But, on the other hand, if the coachman, while his master is away from town, takes his sweetheart for a drive in the park in the master's carriage, and, owing to the charms of the lady, fails to see some unfortunate wayfarer and breaks his leg, the master is not liable, because the servant was certainly not acting in the service for which he was engaged. The fact that he has committed a tort against his master by appropriating his carriage for

amatory purposes does not make the master liable for consequent torts to third parties. As was well said in the judgment of an American court in *Mott* v. *Consumers' Ice Co.* (73 N. Y. Reps. 543): "For the acts of a servant, within the general scope of his employment, while engaged in his master's business, the latter is responsible. Whether the act be done negligently, wantonly, or even wilfully, the quality of the act does not excuse. But if the servant, without regard to his service or his duty therein, or solely to accomplish some purpose of his own, acts maliciously or wantonly, the master is not liable." And again, in *Colman* v. *Dry Dock Co.* (69 N. Y. Reps. 170), the rule was thus laid down: "A master is liable for the wrongful act of his servant to the injury of a third person, where the servant is engaged at the time in doing his master's business, and in acting within the general scope of his authority, although he is reckless in the performance of the duty, or through lack of judgment or discretion, or from infirmity of purpose, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty and inflicts unnecessary and unjustifiable injury."

Thus, where the driver of an omnibus wilfully, and contrary to express orders, pulled across the road in order to obstruct a rival "'bus," thereby causing a collision, it was held that the master was liable,

Willes, J., saying: "Of course one may say that it is no part of the duty of a servant to obstruct another omnibus; and in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say that in my opinion these instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the acts of his servants in the course of his employment, and the law is not so futile as to allow the master, by giving secret instructions to his servant, to set aside his own liability."

The case of *Poulton* v. *London and South-Western Rail. Co.*, L. R. 2 Q. B. 534, seems at first sight to be inconsistent with the above case. There a station-master, having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff and detained him in custody until it was ascertained by telegraph that all was right. The railway company had no power whatever to arrest a person for non-payment of carriage, and therefore the station-master, in arresting the plaintiff, did an act that was wholly illegal, not in the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of the station-master; and *Blackburn*, J., said: "In *Limpus* v. *General Omnibus Co.*, the act done by the driver was within the scope of his authority, though

no doubt it was a wrongful and improper act, and, therefore, his masters were responsible for it. In the present case, an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorised him to do, and a thing which could never be right on the part of the company to do. Having no power themselves they cannot give the station-master any power to do the act."

Applying these principles to the case of partners, you will see at once that a firm of solicitors would be liable for the professional negligence and unskilfulness of one of the partners (*Blyth* v. *Fladgate*, [1891] 1 Ch. 337) (*a*). Similarly, a firm of surgeons would be liable for the unskilful treatment of a patient by a member of the firm. So, a firm of engineers would be liable for the negligence of a partner in the design or construction of works.

But a firm will not be liable for a tort committed by a partner outside the scope of his ostensible authority (*b*), as, for instance, where he wrongfully commences a malicious prosecution for an alleged theft of partnership property (*Arbuckle* v. *Taylor*, 3 Dowl. P. C. 160). For such a proceeding is not within the scope of his ostensible authority, as it has nothing to do with carrying on the business of

(*a*) See also *Marsh* v. *Joseph*, [1897] 1 Ch. 213.
(*b*) See *Mara* v. *Browne*, [1896] 1 Ch. 199.

the firm in the ordinary way. Indeed, it is difficult to imagine a case in which (without express authority, or, what is the same thing, subsequent ratification), a firm would be liable for the violent acts of a member against the person or liberty of a third party.

On the other hand, it is of course quite easy to see that a firm of newspaper proprietors would be liable for a libel inserted by an editor partner, or that a firm of company promoters would be liable for a fraudulent prospectus issued in the course of business by an individual partner. In all these cases the inquiry is simply whether the wrongful act or omission was done or made in the course of the partner's duty as such, or outside of it.

There is one tort from which the firm is specially exempted from liability by statute (viz., 9 Geo. 4, c. 14, s. 6), by which it is enacted, that the firm is not to be liable for the false and fraudulent representation as to the character or solvency of any person, unless the representation is in writing signed by all the partners. The signature of the firm name is insufficient even although all the partners were privy to the misrepresentation (*Swift* v. *Jewsbury*, L. R. 9 Q. B. 301).

(B.) *Liability for fraudulent misappropriations.*—With regard to the special torts referred to in section 11, viz., the misapplication of money or

property by a member of the firm, the liability arises in two cases, viz., (1) where a partner acting within the scope of his apparent authority receives the money and misapplies it, and (2) where the firm receives the money in the course of its business and one or more of the partners misapply it. Cases under this section mostly occur in the case of solicitors and bankers, and the question almost always resolves itself into this, Was the acceptance of the money or property by the defaulting partner within the scope of his apparent authority or not? Now some of these cases have, I think, laid down certain definite rules of law as to what acceptances are, and what acceptances are not, within the ordinary scope of a solicitor partner's authority, but others, although figuring in the law reports, really turn on evidence of partnership usage tending to prove actual as distinguished from ostensible or apparent authority, and therefore decide no general principles of law at all.

The leading cases in which principles of law as to this question have been laid down are, I think, *Harman* v. *Johnson*, 2 E. & B. 61, and *Earl of Dundonald* v. *Masterman*, 7 Eq. 504. In the head-note to *Harman* v. *Johnson* the law is stated as follows: "The receipt of money by one of a firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it is as soon

as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, and attorneys, as such, not necessarily being scriveners." But though the law may be so stated, no one will deny that a course of conduct may be pursued which may convert the act of a partner for which the other members of the firm would not be otherwise liable into one for which they will be responsible. In the other case (namely, *Earl of Dundonald* v. *Masterman*), the head-note is as follows: "Money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business, and, consequently, the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received." In that case the plaintiff being under pecuniary pressure employed the firm in reference to arranging his affairs, and the particular sum received by the partner was received by him in performance of the duties for which the firm was employed. Two other cases, viz., *Cleather* v. *Twisden*, 28 Ch. D. 340, and *Rhodes* v. *Moules*, [1895] 1 Ch. 236, are

sometimes cited by text writers as deciding, as a legal principle, that it is not within the ostensible or apparent authority of a partner in a solicitor's business to accept documents for safe custody, but that it is to accept documents in connection with a mortgage transaction which he is carrying through. When carefully examined, however, they decide no question of principle at all, for in the first it was admitted by the plaintiffs that such a transaction was beyond the ordinary scope of the business of solicitors, and therefore any decision on that point would have been superfluous; and the second case turned on evidence of partnership usage from which the court inferred actual authority.

It need scarcely be pointed out that a firm is not liable for the act of a partner who happens to be a trustee, and, who, without the knowledge of his co-partners, brings the trust funds into the business as part of his capital. No one could contend that such a transaction was one within the scope of a partner's authority, and, indeed, out of abundance of caution, Parliament has authoritatively stated the law as to this in section 13 of the Act of 1890. Of course, however, beneficiaries may follow the trust fund into the trustee's share of the assets of the firm if they can trace it, but that is a matter of trustee law and has nothing to do with the law of partnership.

So much for the first part of section 11. Let us now turn to the second part, viz., the case where a firm, and not merely a partner, receives money or property, and it is afterwards misapplied by one or more of the partners. In such cases no question of partnership authority to *receive* the property arises, because, *ex hypothesi*, the firm, as a firm, has accepted the bailment; and the only question is, whether, as a matter of fact, it has been misapplied by one or more of the partners. I would, however, warn you, that in order to bring a case within this sub-section, the misapplication must be made while the original bailment continues. Thus, where a firm of solicitors accepts from a client money to be invested on a specific mortgage *and it is so invested*, the subsequent fraud of one of the partners who induces the mortgagor to repay the money *to him* and absconds with it, will not render the firm liable; for the misapplication is not made while the money is *in the custody of the firm* (*y*).

(4.) When Liability Joint, and when Joint and Several.

Having now discussed the liability of the firm for the acts *ex contractu* and *ex delicto* of the individual partners, the next question to which I invite your

(*y*) *Sims* v *Brutton*, 5 Ex. 802; 20 L. J. Ex. 41.

attention is *how* the members of the firm are liable. The answer to this question is now contained in sections 9 and 12 of the Act of 1890, and is, that every partner is liable jointly with the other partners for all debts and obligations (*i.e.*, contracts) of the firm incurred while he is a partner, and after his death his estate is also severally liable, as I shall show in a subsequent lecture. But with regard to torts, the partners are liable, not only jointly, but also severally. The net result of this rule is, that with regard to debts and contractual obligations, the plaintiff can only bring one action, and not several actions, against the members of the firm. He is not, however, bound to join all the members of the firm; but if he does not choose to do so he loses his rights against those whom he has omitted. The court may, at the instance of any defendant, order the omitted members of the firm to be added as co-defendants. With regard to torts, on the other hand, the plaintiff may issue separate writs against each partner, either contemporaneously or successively; so that if the first one sued, becomes bankrupt, the fact of his having sued him alone, would be no bar to a second action against another of the partners.

At common law, where one of two joint contractors was sued alone, the defendant had a right to compel the joinder of the other by means of what was called a plea in abatement. But by the statute

3 & 4 Will. 4, c. 42, s. 8, it was provided that no such plea should be allowed unless the person whose non-joinder was pleaded were stated in the plea to be within the jurisdiction, and his place of residence stated and proved. Then, by the Judicature Acts, pleas in abatement were abolished altogether, but large discretionary powers were given to the court as to ordering the joinder of parties. Consequently, although a defendant can no longer plead the absence of a joint debtor in abatement, he can apply to the court to add him as a co-defendant; but the court will not do so where he is out of the jurisdiction, unless it is quite clear that his joinder will not delay or harass the plaintiff (*z*).

The rule as to the joint nature of the contractual claims against a firm, sometimes leads to hardship. Thus, in the leading case of *Kendall* v. *Hamilton*, 4 A. C. 504, a creditor sued the ostensible members of a firm and got judgment, but was unable to levy sufficient to satisfy his debt. He subsequently discovered that there was a wealthy sleeping partner, and forthwith commenced an action against him. It was, however, held, that the debt was a joint and not a several one, and that having already recovered judgment against some of the members of the firm, the plaintiff could not commence fresh proceedings

(*z*) *Wilson & Co.* v. *Balcarres, etc. Co.*, [1893] 1 Q. B. 422.

against the sleeping partner, it being well settled that a judgment against some of several joint contractors, is, even without satisfaction, a bar to an action against another of them alone.

If, however, the claim had been for a tort instead of a debt, the second action would have been maintainable. This rather absurd distinction does not prevail in Scotland, nor on the continent, where partnership debts and contracts are several as well as joint.

With regard to the extent of a partner's liability, each is liable for the whole of the debts and liabilities of the firm, and even although judgment be obtained against all jointly, it may be enforced against one only, leaving all questions of contribution to be settled afterwards between the partners (*a*).

(5.) Duration of the Liability.

We now come to the duration of a partner's liability for the firm and his other partners. In other words, from what date do the firm and his co-partners become his agents, and at what date does that agency cease? Speaking broadly, the agency commences when he becomes a partner, and ceases as to future acts, when either he retires from the firm (the business being continued by the other

(*a*) *Abbott* v. *Smith*, 2 W. Bl. 947.

partner or partners) or in the event of a dissolution and winding up of the business, at the date when the liquidation *is fully complete and ended* (*b*). But after dissolution the agency is limited to acts strictly necessary for completing the liquidation (*c*).

(A.) *New partner not liable for old debts.*—Thus a new partner, admitted into an old firm, is not liable for the habilities existing at the date when he joins (*d*) ; for merely joining an existing firm does not imply that the joining partner adopts and takes over the existing liabilities. No doubt he can do so, and make himself directly liable to the old creditors, by a process called novation, to which I shall presently advert ; but novation implies an agreement with the creditor, either express or inferred from conduct.

Other countries do not follow our law in respect to debts incurred before the admission of a new partner. For instance, the Italian Commercial Code (*e*) renders a new partner liable, equally with the old ones, for engagements contracted by the firm before his admission.

(B.) *Retiring partner not liable for future debts.*—So, conversely, a partner who retires from a continuing firm does not thereby cease to be liable for

(*b*) Act of 1890, s. 38.
(*c*) *Smith* v. *Winter*, 4 M. & W. pp. 461, 462.
(*d*) Act of 1890, s. 17 (1).
(*e*) *Codice Commerciale*, Art. 78.

the existing liabilities As between himself and the continuing partners, there may be (and very often is) an agreement that the existing liabilities shall be borne by the continuing partners alone; but that cannot release the retiring partner from his liabilities to third parties. In fact, here again, express release or novation is the only way in which he can be freed.

(c.) *Novation may negative above rules.*—What, then, is novation? It is a tripartite agreement between the creditor, the partner who is either joining or retiring, and the other partners, by which a new agreement with the creditor is substituted for the old one, either making a new partner liable for old debts, or releasing a retiring partner, and accepting in his place the credit of the continuing partners either alone or plus any new partners (*f*). Such an agreement may be express, or implied from a course of dealing between the creditor and the firm as newly constituted (*g*). The question is always one of fact, and, in the absence of express novation, the court is very shy of inferring it from the course of dealing; and the mere adoption by the creditors, of the new firm as their debtor, does not of itself discharge the retired partner.

(*f*) See *Scarf* v. *Jardine*, 7 A. C. at p. 351.

(*g*) Act of 1890, s. 17 (2). See *Juegers, &c. Co.* v. *Walker*, 77 L. T. 180.

On the other hand, a novation is not void for want of consideration (*h*); and where the creditor knows of the change in the constitution of the firm, and continues to deal with the new firm, making no claim on the retiring partner for a long period, a novation will be inferred (*i*), and the acceptance of a bill of exchange or other security for the debt from the new firm, is strong, although not conclusive, evidence of novation (*k*). The question is always a difficult one, and you will find the cases elaborately discussed by the present Master of the Rolls in his great work on partnership.

(D.) *Necessity for retiring partner to notify his retirement.*—But although, in the absence of novation, a partner who retires from a firm cannot rid himself from the liability for past debts, he ceases to be liable for the future liabilities of the new firm, because, by retiring, he cancels the agency. But (and this is of the utmost importance) he must notify that the agency is cancelled both, publicly, in the Gazette, and also, privately, by actual notice to each of the customers of the old firm (*l*). The justice

(*h*) *Thompson* v. *Percival*, 5 B. & Ad. 925.

(*i*) See *Rolfe* v. *Flower*, L. R. 1 P. C. 27; *Bilborough* v. *Holmes*, 5 Ch. D. 255.

(*k*) *Swire* v. *Redman*, 1 Q. B. D. 536; *Re Head*, [1893] 3 Ch. 426.

(*l*) *Graham* v. *Hope*, 1 Pea. 208; 3 Rev. Rep. 671.

of this requirement is obvious, for a person who deals with a firm is entitled in common fairness to treat all apparent members of the old firm as being still members until he has notice of the change, or until any partner dies. This rule as to the necessity of notice is now summed up in section 36 of the Act of 1890. It does not apply to a dormant (*i.e.*, a secret partner), except, of course, with regard to customers who are in the secret; for *cessante ratione cessat lex.*

(6.) Doctrine of "Holding out."

And this brings me to what is commonly called the doctrine of "holding out." This doctrine is stated in section 14 of the Act of 1890, as follows:

"14.—(1.) Every one who by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

"(2.) Provided that where after a partner's death the partnership business is continued in the old-firm name, the continued use of that name, or the deceased

partner's name as part thereof, shall not of itself make his executors or administrators, estate or effects, liable for any partnership debts contracted after his death."

The doctrine of "holding out" is a branch of the doctrine of estoppel. If a man holds himself out as a partner in a firm, and thereby induces another person to act upon that representation, he is estopped as regards that person from saying that he is not a partner. The representation may be made either by acts or by words; but the estoppel can be relied upon only by the person to whom the representation has been made in either way, and who has acted upon the faith of it (*m*). It is immaterial that the holding out was not communicated directly by the party holding out to the creditor. It is equally fatal to the former if the news was communicated to the latter by a third party (*n*). It is really on this ground of "holding out" that a retiring partner who does not give notice is liable for the future debts.

It is obvious that questions of "holding out" may occur where a partner retires and still permits his late partners to retain his name as part of the firm name. It would seem, however, that where proper notices of the dissolution are given, the mere fact

(*m*) *Per* Lord *Esher*, M. R. : *Ex parte Central Bank of London*, [1892] 2 Q. B., at p. 637

(*n*) *Martyn* v. *Gray*, 14 C. B. (N.S.) 824.

that the retiring partner allows the continuing partner to carry on business in the old firm name, is not such a holding out of the former, as a partner, as will render him liable for a debt of the firm contracted after the dissolution, even with a person who had not dealt with the old firm, and who had therefore no express notice of the dissolution (*o*); and this appears to be so, although the name of the retiring partner forms part of the firm name, unless, perhaps, the retiring partner actually authorises the use of his name (*p*). But, nevertheless, he could, in the absence of agreement, restrain his late partners from using the name in such a manner as to expose him to litigation; although he is not bound to do so (*q*).

The use of the name of a deceased partner can in no case expose his representatives to liability (*r*).

(7.) Continuance of the Agency after Dissolution.

Lastly, the mere fact of the dissolution of a partnership does not cancel the agency of each of the partners for the other or others of them, until the business is wound up. The reason of this is obvious, for otherwise it would be extremely inconvenient to

(*o*) *Ex parte Central Bank, etc., ubi supra.*

(*p*) *Newsome* v. *Coles*, 2 Camp. N. P. 617; 12 Rev. Reps. 756.

(*q*) *Thynne* v. *Shove*, 45 Ch. D. 577; *Gray* v. *Smith*, 43 Ch. D. 208.

(*r*) Section 14, sub-section (2) of the Act of 1890, and see *Farhall* v. *Farhall*, 7 Ch. App. 123.

wind up the concern at all. The agency is, however, restricted to such acts as may be necessary for winding up the affairs of the partnership, and completing transactions begun but not finished at the time of the dissolution (*s*).

To sum up the liability of partners for each other, the broad general principle is this: If you authorise a man to do a class of acts for you, you are liable for his contracts and torts in carrying out your mandate. You are also liable not only in respect of acts which you expressly authorised, but in respect of all such subsidiary acts as would usually be ancillary to the authorised ones, unless you have expressly forbidden them, and the party injured either knows that you have forbidden them, or does not know that you are the principal. And when once you have allowed the agency to be known, you remain liable until you have notified that it is cancelled.

(*s*) Act of 1890, section 38; and see *Fox* v. *Hanbury*, Cowp. 449; *Butchart* v. *Dresser*, 4 De G. M. & G. 542; *Re Clough*, 31 Ch. D. 324.

LECTURE IV.

THE RELATION OF PARTNERS TO ONE ANOTHER.

THE relation of partners to one another may, of course, be wholly governed by the terms of the partnership agreement. One may agree to do all the work in consideration of the other finding the capital. One may reserve to himself the whole right of signing cheques and bills, or even of expelling his partner if he thinks fit. One may take a fixed sum out of the profits (like a preference shareholder in a company), leaving the surplus, if any, to the other partners; or the business may be ostensibly carried on by one only, the other taking no active part in its administration, and the partnership being unknown to the public. In such case the passive partner is called a sleeping or dormant partner, but *quâ* the creditors, he is as much a partner, and as responsible as such, as if he took an equally active share in the administration of the concern with the person who ostensibly carries it on.

(1.) Utmost Good Faith between Partners is an Implied Term of every Partnership Agreement.

However, whatever may be the terms of the agreement, there is one stipulation which is imposed by law in every such contract, viz., that each partner must observe the utmost fairness and good faith towards his fellows. The foundation stone of the partnership edifice is mutual confidence, and where confidence is reposed equity insists that it shall not be abused. Thus, even where a partnership agreement provided that a partner might be expelled for breach of certain specified acts, it was held by *Romer*, J., that the expelling partners were not entitled to spring a notice of expulsion on a partner committing one of such acts without giving him some preliminary warning of the cause of complaint, and an opportunity of meeting the case alleged against him (*a*).

It seems regretable that the powers of the Act of 1890 did not affirm this broad general principle, and the omission is the more remarkable because section 257 of the Indian Contract Act provides that the partners are "to carry on the business of the partnership for the greatest common advantage, to

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(*a*) *Barnes* v. *Youngs*, [1898] 1 Ch. 414.

be just and faithful to each other, and to render accounts," etc. A broad general principle of this kind is just what one would expect to find in a code, but it is not to be found in the English Act, which treats the subject-matter inadequately, by reference to particular circumstances in sections 28—30 in the following words:

"28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

"29—(1.) Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connexion (*c*).

"(2.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

"30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must

(*c*) Merely declaratory. *Aas* v. *Benham*, [1891] 2 Ch. 244, 245.

account for and pay over to the firm all profits made by him in that business " (*d*).

In other words, a partner, like a trustee, must not make a private gain by reason of his membership of the firm. Thus he must account to the firm for all commissions on sales or purchases of the firm's property. He must not, without full disclosure to his co-partners, take an interest, as part purchaser, in a sale of the partnership property (*e*), nor, as part vendor, in a sale of property to the firm. So where a partner uses his position to get a private agreement with a customer of the firm, in relation to goods dealt in by the firm, beneficial to himself only, he will have to share the profits with his co-partners; for he is abusing his position for his own selfish ends and to the detriment of the joint business (*f*).

On similar principles, a partner, like a trustee, cannot retain the benefit of the renewal of a lease to himself only, of property leased to the firm (*g*), whether he obtains the renewal secretly or openly (*h*).

At the same time, unless expressly restricted by the agreement, a partner may carry on another

(*d*) *Cf.* Indian Contract Act, 259; see also *per Lindley*, L.J., [1891] 2 Ch. at p. 255.

(*e*) *Dunne* v. *English*, 18 Eq. 524; *Re Olympia, Limited*, [1898] 2 Ch. 153.

(*f*) See *Russell* v. *Austwick*, 1 Sim. 52; 27 Rev. Reps. 157.

(*g*) *Clegg* v. *Fishwick*, 1 M. & G. 294.

(*h*) *Clegg* v. *Edmondson*, 8 D. M. & G. 787.

business privately, so long as it does not compete with the business of the firm, and so long as he does not represent it to be the business of the firm. In such cases he is not bound to account for the profits of a non-competing business (*i*), although he may be enabled to push the private trade better than would otherwise be the case, by reason of his connection with the firm.

(2.) Terms as to Management Implied where not Expressly Negatived or Modified.

Subject however, to what I have said as to good faith, the partners can arrange their respective rights and duties as they may think fit; and what I am about to say only relates to the legal rights of the partners *inter se*, so far as these rights are not modified or negatived by express stipulation, or (what amounts to the same thing) by a long course of dealing, amounting to evidence of an implied agreement (*k*).

Now this subject is mainly governed by section 24 of the Act of 1890, by which it is enacted that "the interest of partners in the partnership property and

(*i*) *Aas* v. *Benham*, [1891] 2 Ch. 244.

(*k*) Section 19 of Act of 1890. *Coventry* v. *Barclay*, 3 De G. J. & S. 320.

their rights and duties in relation to the partnership, shall be determined, subject to any agreement express or implied between the partners, by" certain rules therein set forth. For our purpose it will be convenient to take these rules in a different order to that in which they appear in the Act.

First, then, "Every partner may take part in the management of the partnership business" (*l*), but he is not entitled to any remuneration for his work (*m*). The Act does not add (but the law implies) that each partner shall attend to and work in the business, and if he fails to do so it is ground for a dissolution, and the court may order him to make compensation to the industrious partner for the extra trouble thrown upon him by the other's idleness (*n*).

Moreover, the rule as to the gratuitous nature of a partner's services, being founded on the theory that all the partners will work, does not apply during a winding-up where one of the partners is dead, or retires, or becomes a lunatic. In such cases, all the work being thrown on the other partner or partners, he or they are entitled to some compensation for their trouble out of the profits, if profits there be, but not otherwise (*o*). This right has even been

(*l*) Sect. 24 (5). (*m*) *Ib.* (6).

(*n*) *Airey* v. *Borham*, 29 Bea. 620.

(*o*) See *Re Aldridge*, [1894] 2 Ch. 97; *Brown* v. *De Tastet*, Jac. 284; 23 Rev. Reps. 59; *Mellersh* v. *Keen*, 27 Bea. 236; and *Page* v. *Ratliffe*, 75 L. T. 371.

conceded to a partner who has been appointed receiver and manager without salary in a dissolution action, where he has voluntarily, and with benefit to the assets, done work (*e.g.*, as a skilled mechanic) outside his duties as receiver and manager (*p*). No remuneration will, however, be allowed to partners after the death of a co-partner, where they are also his executors, as it is their duty *quâ* executors to work gratuitously (*q*).

But although the law is, as I have stated, viz., that the partners must attend to business, and that in the absence of agreement or of idle misconduct on the part of one of the partners, no remuneration will be allowed for work or even for overtime, yet nothing is commoner than to find the rule negatived by express stipulation. A junior partner is very generally bound by the terms of the contract to attend diligently and exclusively to the business. A senior partner, on the other hand, generally insists on the right of consoling his declining years by indulgence in leisured ease, merely reserving the right, but not conceding any obligation, of attending to business. Moreover, a clause is very common, and, indeed, highly desirable in partnership articles, authorising each working partner to take a salary as

(*p*) *Harris* v. *Sleep*, [1897] 2 Ch. 80.

(*q*) *Bunden* v. *Bunden*, 1 V. & B. 170; 12 Rev. Reps. 210; *Stocken* v. *Dawson*, 6 Bea. 371.

manager of his department in addition to his share of profits, such salary being paid, like clerks' salaries, before the net profits are computed, and being, in fact, treated as an outgoing of the firm.

Now supposing that the partnership articles, or the partnership course of dealing, makes no provision for differences of opinion as to the conduct of the business (and, of course, differences of opinion are almost certain to occur), how are these differences to be settled? The answer is, that if such differences relate to an alteration of the partnership constitution—for instance, to a proposed change in, or addition to, the nature of the business, or the introduction of a new partner (*r*), or the expulsion of a partner (*s*), or the substitution of a new partner for one who desires to retire and sell his share (*t*), then, in the absence of express stipulation, no such alterations can be made without the unanimous consent of all the partners. But if the difference relates merely to the details of the business—"ordinary matters connected with the partnership business," as section 24 of the Act of 1890 puts it—then the question may be decided by the majority (*u*). Where the voting is equal (as, for instance, it would necessarily be where there are only two

(*r*) Act of 1890, s. 24 (7).
(*s*) *Ib.* s. 25.
(*t*) *Ib.* s. 31.
(*u*) *Ib.* s. 24 (8).

partners), I apprehend (although the Act is silent as to this) that those who negatived the disputed proposition would be entitled to have their view respected, in accordance with the general principle applicable to all voting, viz., that the onus lies on those who affirm a proposition, and not on those who oppose it.

This power of a majority to bind a dissentient minority in matters of detail, is practically new in point of law, whatever it may have been in point of commercial practice, and is founded on the precedent of section 253 of the Indian Contract Act. It must be exercised subject to that general over-riding principle to which I have already drawn your attention, viz., that every partner must act with the utmost good faith. Therefore, a majority cannot bind a minority without notice to them, and without giving them the opportunity of discussion. If this were not so, it would practically put the entire management in the hands of a high-handed majority, and would be in conflict with the rule that every partner is entitled to take part in the administration of the business.

It is, of course, incidental to this last-mentioned right, that each partner should have access to the books of account; and, consequently, sub-section (9) of section 24 declares that "the partnership books

are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them."

(3.) Terms, as to Capital Profits and Losses, implied where not expressly negatived or modified.

Let us now turn from the rules as to management to the rules which, in the absence of stipulation to the contrary, or evidence from which such stipulation can be inferred, govern the relations of the partners with regard to capital and profits and losses.

The general rule, then, is that "all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm" (*y*). This broad statutory statement, however, requires, I think, some explanation. There are many partnerships, perhaps the majority, in which the capital is not contributed equally,—nay, is perhaps contributed by one alone. For although, as the French Code Civil has it (*z*), every

(*y*) Act of 1890, s. 24 (1). (*z*) Art. 1833.

partner must contribute either money or goods or industry to the undertaking, yet "capital" in the legal sense only embraces property, and not mere skill or industry. Consequently, the section does not mean that where of two partners one contributes, say, 5,000*l.* as capital, and the other contributes no money, but merely great technical skill and knowledge, the assets into which the 5,000*l.* has been converted are, on the winding up of the concern, to be divided equally as one common fund. That is not so, as I will show you when I come to deal with the dissolution of a partnership, because the facts negative the idea that the capital was equal, and the section only applies in the absence of a contrary agreement, express or implied. What the section does mean is this, that in such a case the *profits* would be divided equally, because, in the absence of express agreement, the inference is that the 5,000*l.* of the moneyed partner was considered to be the equivalent for the skill or knowledge of the other partner. But, *per contra*, if they divide the profits equally, they must likewise equally bear the losses; and by losses I mean not only the liabilities of the firm to third parties, but also losses of capital. Therefore, assuming that the 5,000*l.* were lost, the partner who brought no capital into the concern, would nevertheless have to bear half that loss in favour of the moneyed partner; the 5,000*l.* being, in

fact, treated as a deferred debt due from the firm to him. In short, all that the rule means is that there is no necessary connection between the proportion in which capital is contributed and that of profit and loss, and that, therefore, *primâ facie*, partners share profits and bear losses equally, notwithstanding that the capital contributed by each may not be equal. In other words, profit and loss are not shared and borne in proportion to the *capital* contributed by each partner.

On the other hand, there is an inference that losses are to be borne in the same proportion as *profits* are shared; and therefore an agreement to share profits in certain proportions, is, by section 44 of the Act, made *primâ facie* evidence that it was intended that losses should be borne in the same proportions and not equally (*a*).

It is a corollary of the rule as to the equality of profit and loss, notwithstanding inequality in contribution of capital, that, in the absence of agreement to the contrary, no partner is entitled to receive interest on the capital contributed by him; for if he is unwilling to find the necessary capital without receiving interest, he should make it an express condition of his bargain with his

(*a*) Declaratory of the former law; see *Re Albion Life ance Society*, 16 Ch. D. 87.

co-partner, whose skill has *primâ facie* been accepted by the moneyed partner as an equivalent for his capital. At the same time, however beautiful this may be in theory, nothing is more usual in practice than to find that partnership agreements provide, that, before the profits are ascertained, each partner shall be entitled to receive interest at the rate of five per cent. per annum on the amount of capital standing to his credit, as an outgoing, and in priority to any division of profits. Indeed, in the majority of cases, the omission of such a clause would be most unreasonable, as, for instance, where the old and experienced members of a firm take in the son of a member, who brings little or no capital, there is really no reason why he should have the use of the senior partners' capital for nothing.

I may perhaps add, that even where there is a provision for interest on capital, such interest ceases to be payable directly the partnership is dissolved, although months or years may elapse before the assets are completely realized and the capital repaid.

But although, in the absence of stipulation, a partner is not entitled to interest on capital contributed by him under the partnership agreement, yet if a partner makes, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to

subscribe, he is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance (*b*).

The reason of this is stated by the present Master of the Rolls to be that such advances are not treated as an increase of capital, but rather as a loan on which interest ought to be paid, and, by commercial usage, is payable.

Perhaps I might mention here that, although the firm pays interest to a partner on his advances, the converse does not hold good; and in the absence of fraud or express agreement, a partner, who is indebted to the firm, pays no interest (*c*).

(4.) Implied Terms as to Indemnification of Partners.

Another rule of law is, that, as each partner is the agent of the firm, the latter, in its character of his principal, "must indemnify every partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm."

(*b*) *Ex parte Chippendale*, 4 D. M. & G. 19, last note; *Sargood's Claim*, 15 Eq. 43; Lindley, 391

(*c*) *Cooke* v. *Benbow*, 3 D. J. & S. I., and *Meymott* v. *Meymott*, 31 Bea. 445.

But, in addition to this, the same section also provides that the firm must indemnify every partner in respect of payments made and liabilities incurred in or about anything necessarily done for the preservation of the business or property of the firm. This goes beyond the ordinary law of principal and agent (which only authorises acts in the ordinary course of the business), and is analogous to the maritime law of contribution in cases of general average or salvage. You will note that it only extends to *necessary* acts, and not to mere voluntary ones which the partner who undertakes the liability thinks may be advantageous (*d*). Most of the cases on the subject have occurred in relation to directors of public companies (*e*), but even before the Act of 1890 there was no doubt that the rule equally applied to private partnerships.

(5) Partnership Property as Distinguished from Property of the Individual Partners.

We now come to the consideration of the partnership property, which is the subject of sections 20 to 23 inclusive of the Act of 1890. Difficult questions

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(*d*) See judgment of *Turner*, L.J., in *Burdon* v. *Barkus*, 4 D. F. & J. at p. 51.

(*e*) See *Ex parte Chippendale*, 4 D. M. & G. 19; *Ex parte Bignold*, 22 Bea. 143; *Baker's Case*, 1 Dr. & Sm. 55.

frequently arise as to whether property is the property of the firm, or whether it is the property of individual partners; for property may be used for purposes of the partnership and yet may not be part of the partnership property. For instance, the building in which a business is carried on frequently belongs to one partner only, and the firm pays him a rent for the use of it. Moreover, persons may be mere co-owners of property and may yet be partners in the profits made from its use. Thus persons may be co-owners of a coal mine—take the case of two brothers to whom it may have been devised by the will of their father. The mere fact that they work the mine in partnership as a colliery business does not make the *mine* part of the partnership property (*f*).

The point is often of great importance, (1) as between the partners themselves; because an increase in the value of partnership property belongs to the firm, whereas if the property be the property of an individual partner the increased value belongs to him only (*g*); (2) as between the creditors of the firm and the creditors of the individual partners in the event of the firm becoming insolvent, as I shall show in a subsequent lecture; and (3) as between the persons who take a deceased partner's real estate

(*f*) *Crawshay* v. *Maule*, 1 Sw. 495, 518.
(*g*) *Robinson* v. *Ashton*, 20 Eq. 25.

and those who take his personal estate; because his interest in partnership land is personalty and not realty as I shall show presently.

Now the first principle in relation to this question is, that whether property is or is not partnership property, depends on the agreement, express or implied, between the partners.

Where there is an express and unambiguous agreement between them in relation to any item of property, no difficulty can arise. Thus, although the goodwill of the business is *primâ facie* partnership property, it is open to one of the partners to prove that the goodwill was his before the partnership, and that it was agreed that, although the firm should have the benefit of it during the partnership, it should revert to him on a dissolution. So office furniture or tools may be used by the firm and yet remain the property of one partner, by agreement.

In the absence, however, of express agreement, we have to fall back on an implied one; that is to say, giving both partners credit for common sense and business capacity, and taking all the known facts into consideration, we have to draw a reasonable inference as to what was the exact understanding between the partners.

Now, speaking broadly, when we find property bought with partnership money (*h*) or brought into

(*h*) Act of 1890, s. 21.

the common stock, and credited in the books as part of the capital of one of the partners (*i*), or otherwise treated by the partners as part or parcel of the partnership property (*k*), the inference is that it is partnership property, and none the less so because the property happens to have been conveyed to or taken in the name of one only of the partners (*l*), or that it was originally devised to the partners as co-owners.

Section 20 of the Act of 1890 states the law thus:—

"(1.) All property, and rights and interest in property, originally brought into the partnership stock, or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement.

"(2.) Provided that the legal estate or interest in any land (*m*), or in Scotland the title to and interest

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(*i*) *Robinson* v. *Ashton*, 20 Eq, 25.

(*k*) *Waterer* v. *Waterer*, 15 Eq. 402.

(*l*) *Smith* v. *Smith*, 5 Ves. 189; 5 Rev. Reps. 22.

(*m*) By the Interpretation Act, 1889, s. 3, land includes "messuages, tenements, and hereditaments, houses and buildings of any tenure."

in any heritable estate which belongs to the partnership, shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

"(3.) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners, for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase."

I will now give you a few illustrations of the principle (which is frequently very difficult of application). Let us, first, take the case of *Waterer* v. *Waterer* (15 Eq. 402). There a nurseryman carried on business on a piece of freehold land belonging to him in fee simple. On his death, he devised all his property to his three sons as tenants in common. They continued the nursery *business* in partnership, and, out of moneys belonging to the father's estate, completed the purchase of adjacent land which the father had agreed to buy, and employed such land

also in the business. Two of the sons then purchased the share of the third *in land and business at one price* and continued the business, and the question ultimately arose on the death of one of them, whether the land was partnership property or not. It was held that it was, *James*, V.-C., saying: "I am of opinion that this case is governed by that class of cases in which Lord Eldon said, that where property became involved in partnership dealings it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent or otherwise, if, in fact, it was substantially involved in the business. They buy it, not as an undivided third only, but *for one lump sum, including the goodwill*; therefore it was in fact a purchase of land and business together by the continuing partners jointly for the purpose of the business. Under these circumstances I think they must be deemed to have irrevocably appropriated each of them his share in the land to the partnership purposes. A nursery gardener's business is probably one above all others where men would act as these gentlemen appear to have done. They necessarily appropriated the soil itself for gardening purposes, which could not be carried on without it. It is, in fact, in nursery gardening, practically impossible to separate the use of the soil for the trees and shrubs, from the trees

and shrubs themselves, which are part of the freehold, and at the same time constitute the substantial stock-in-trade."

On the other hand, as by section 2 of the Act, mere co-ownership does not of itself create partnership in the thing co-owned, so the mere fact that the co-owners were co-partners in a business carried on in connection with the thing owned in common does not of itself make that thing partnership property. Thus, in *Davis* v. *Davis*, [1894] 1 Ch. 393, partners in a business borrowed money on the security of some house property of which they were undoubtedly mere tenants in common. This money they expended, partly in erecting on a small part of the mortgaged property workshops as an addition to works in which they carried on the partnership business, and which also originally, at all events, belonged to them merely as co-owners. On these facts it was held, by *North*, J., that section 20 (2), of the Act applied, and that the addition to the workshops did not become partnership property. The learned judge, in the course of his judgment, said: "It is not the law that partners in business, who are the owners of the property by means of which the business is carried on, are necessarily partners as regards the property. That conclusion is indeed expressly negatived by sub-section (1) of section 2 of the Act

of 1890, and there are many cases before the Act to the same effect. There is the well-known case of *Fromont* v. *Coupland* (*n*), in which two persons horsed a coach, and shared the profits derived from running it, and were held to be partners, though they were not partners in the horses by which the work was done. Take again the well-known case of ships owned in common. Again, there is the case of *Steward* v. *Blakeway* (*o*), in which land belonging to co-owners as tenants in common was used for the purpose of carrying on a quarrying business; but that of itself was not considered sufficient to make the co-owners partners in the land; in fact, sub-section (1) of section 2 of the Act seems to me conclusive, unless there is something else in the case, that the two were not partners in the land. The land was vested in them as tenants in common, each, that is to say, being owner of an undivided moiety; and if the land became partnership property, the question would arise when and how it became so, and there is no evidence that anything was done by agreement to make the land partnership property, and the facts to which I have referred as supporting the view that there was a partnership in the business do not apply to the land."

(*n*) 2 Bing. 170. (*o*) 4 Ch. App. 603.

His lordship then cited a case of *Morris* v. *Barrett* (3 Y. & J. 384), which was very like the case in hand, and after referring to *Waterer* v. *Waterer* (*supra*), and *Davies* v. *Games* (12 Ch. D. 813), which followed it, proceeded as follows: "I have looked at many other cases upon this point, and I have found several other instances in which lands have been held to be, to use the words of Lord Justice *James*, involved in partnership dealings, and therefore regarded as partnership property. The well-known case of *Darby* v. *Darby* (*p*), is one of them. There, two persons purchased land on a joint speculation with their joint moneys, for the purpose of laying it out in building plots and re-selling it at their joint profit or loss, and it was held that the land was the very essence of the thing to be dealt with, and was, therefore, converted out and out. *In re Hulton* (*q*), a solicitor and another person entered into a similar land speculation. There was a good deal of evidence in that case, and the view which I took in that case was, that there was not enough to show that the land was partnership property, but the Court of Appeal held that there was. It was a complicated case; and it is not worth while referring to the details, but it is an illustration of the principle.

(*p*) 3 Drew, 495.

(*q*) 62 L. T. (N.S.) 200.

"In my opinion, the mere fact that the two houses, which, according to the special case, were not more fitted than any others for the carrying on of the business, were used for it, did not make them involved in the partnership dealings in such a way as to become partnership property.

"They began for the first time to use No. 60, Sumner Street, for the partnership purposes, in October 1889, and they spent some money in adapting it to their purposes, and that money was the joint money of the two brothers. But, in my opinion, that is not enough to indicate that there was a partnership in the land. If the money which they expended in adapting this additional piece of land, had been spent in buying it, instead of improving it, it is clear that it would not have become partnership property, because, in that case, it would have been hit exactly by sub-section (3) of section 20 of the Partnership Act, which says: 'Where co-owners of an estate or interest in any land . . . not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the

purchase.' In the present case, the money which was borrowed was not employed in paying for the additional piece of land which was brought into the business. If it had been the case, it would have been exactly within that sub-section; but the case seems to me so like that, that, although it is not literally covered by the sub-section, the same law applies to it.

"Under the circumstances I come to the conclusion that there was a partnership in the business, but that none of the houses, Nos. 60, 62, and 64, Sumner Street, were partnership property."

Now the distinction between *Waterer* v. *Waterer*, and that class of cases, and *Davis* v. *Davis*, and other cases of the like kind, no doubt presents considerable difficulty even to trained lawyers, as is shown by the fact that Mr. Justice *North* was himself overruled in *Re Hulton*, *supra*; but I think it comes to this, that, *primâ facie*, the mere fact that partners use a thing, of which they were originally only co-owners, for partnership purposes, does not convert it into partnership property. There must, in fact, be some evidence of intention to treat the property as part of the capital of the business. In *Davis* v. *Davis* and *Morris* v. *Barrett* there was no such evidence. On the other hand, in *Waterer* v. *Waterer*, and *Davies* v. *Games* there was some evidence. For instance in *Waterer* v. *Waterer* the

two partners bought the share of the retiring partner in the land and in the undoubted partnership assets at one price, so that the land did become undoubtedly involved in the partnership business. So in *Davies* v. *Games*, in the words of the learned Vice-Chancellor who tried it, "it appeared that when his (the retiring partner's) share was sold, there was a valuation and ascertainment of the stock and so forth, and the liabilities of the business, and that they were found to balance one another, and that Benjamin and William took to the retiring partner's share of the stock, and also took upon themselves the whole of the business liabilities." The transaction (like that in *Waterer* v. *Waterer*) was in fact substantially one of a purchase of a share of a mixed property, viz., the farm and stock as a going concern. Moreover, there was parol evidence that the partners bought the share in the land "just as they bought cattle, stock, and other things for the farming business."

In short, the question whether property has become partnership property or not, is always a question of fact, and generally one of a very difficult nature, in which one must endeavour to ascertain whether it has been treated by the partners as part of the common stock, or merely used either at a rent, or by gratuitous license, as ancillary to the carrying on of the business.

(6.) DEVOLUTION OF PARTNERSHIP PROPERTY.

I should, however, mention one result of real estate becoming part of the partnership property, (although this is no part of the law of partnership, but is rather an illustration of the general rule of equity as to conversion) viz. (in the words of section 22 of the Act): "Where land, or any heritable interest therein, has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate."

The principle of the rule is simply that *primâ facie* (*i.e.*, in the absence of agreement to the contrary), all the property of the firm, real and personal, has to be sold on dissolution of the partnership. Consequently, in equity, it is converted into personal estate, and therefore devolves as such. If, however, on the true construction of partnership articles, it appears to have been the intention that the real estate of the firm should not be sold on dissolution, but should be continued to be held in joint tenancy or tenancy in common, then the presumption is rebutted, and it will devolve as real estate (*r*).

(*r*) See *Re Wilson*, [1893] 2 Ch. 340; *Steward* v. *Blakeway*, 4 Ch. App. 603.

Anyhow, the conversion, even where it exists, is only a conversion in equity, and the legal estate or interest devolves according to the nature and tenure of the land, and the general rules of law applicable thereto, but in trust, so far as necessary, for the persons beneficially entitled to the proceeds (*s*). Since the Land Transfer Act, 1897, however, this has become immaterial, except as to copyhold lands.

(7.) Voluntary and Involuntary Alienations of a Partner's Share in the Profits and Assets.

We now come to quite a different question, viz., in the absence of express stipulation, is the share of a partner in the business and assets, or in the profits, capable of being alienated either voluntarily or involuntarily? The answer is, that without the consent of all the partners (unless there be some express stipulation), a partner cannot transfer his share *in the partnership* so as to place another person in his shoes with all the rights of a partner. Partnership is founded on personal confidence; and the confidence which one may feel in the partner of one's choice may not be extended to the assignee of his. I might be very willing to be the partner of the reasonable and industrious Jones, but might recoil from entering into a like relation

(*s*) Section 20 (2).

with his assignee, the cantankerous and idle Brown. Therefore the law is not so unreasonable as to allow Jones to foist Brown on me as his substitute, and still less to allow Jones's creditors to force themselves on me in place of Jones, for the purpose of liquidating the debts due from him (*t*).

At the same time the law allows a partner to assign, either absolutely or by way of mortgage, his share in the *assets* and *profits*; so that the assignee, although not entitled to interfere in the management of the business, nor, during the continuance of the partnership, to require any accounts from the other partners, nor to inspect the partnership books, nor otherwise to exercise any of the functions of a partner, is entitled to receive the share of profits to which the assigning partner would otherwise be entitled; but he must accept the balance sheet as to profits, agreed to between the partners, without question (*u*).

In case of a dissolution, the assignee is entitled to receive the assigning partner's share of the assets, and for the purpose of ascertaining that share he is entitled to an account, but only as from the date of the dissolution (*x*).

With regard to involuntary alienations, the court is empowered, by section 23, on the application of a

(*t*) Section 24 (7).
(*u*) Section 31 (1). (*x*) *Ib.* (2).

judgment creditor of one of the partners, to make an order charging his interest in the assets and profits with payment of the judgment debt and interest, and may appoint a receiver of the partner's share of the profits. It would seem, however, that the court cannot order accounts against the other partners any more than a voluntary assignee could demand them(*y*). The other partners are empowered to redeem, or, in the case of a sale being directed, to purchase the share of the partner whose share is so charged. Moreover, section 33 recognises that a partner who allows his share to be so charged is not a desirable one, by declaring that, in such cases, the partnership may, at the option of the other partners, be dissolved. There is, however, no similar provision with regard to voluntary assignments or mortgages of a share, although partners might, I think, reasonably object to one of their number depriving himself of all beneficial interest in the business, and, therefore, of all incentive to exertion for the common good.

(*y*) *Brown, Jansen & Co.* v. *A. Hutchinson & Co.* (No. 2), [1895] 2 Q. B. 126.

LECTURE V.

THE DISSOLUTION OF THE FIRM.

We have now disposed of the creation of partnerships, and the relations of partners to each other, and to third parties during the life of the firm. But all things have an end (except corporations, which, according to authority, are perpetual), and firms can no more claim immunity from the common doom than individuals.

Now, as in the case of marriage, so in the case of partnership, the tie may be severed either by death or dissolution; but, unlike marriage, the intervention of Sir Francis Jeune, or any other wearer of the ermine, is not necessary for the latter process.

We cannot marry for a fixed term, still less for what commercial lawyers call a single adventure; nor can we, in this country, obtain a divorce by mutual consent. A marriage, legitimate in its inception, can never become illegal by subsequent circumstances; nor does the bankruptcy of a spouse enable his or her better or worse half to sever the connection.

(1.) Dissolution without having Recourse to the Court.

In business partnerships, however, all these things are possible. A partnership is dissolved, without the intervention of a court, by any of the following circumstances (*a*) :

(A.) If entered into for a fixed term, by the expiration of that term (*b*).

(B.) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking (*b*).

(C.) If entered into for an undefined time, by any partner giving notice to the other or others, of his intention to dissolve the partnership, unless the articles provide for some other method (*b*).

(D.) By the death of any partner (*b*), unless the articles provide (as they frequently do) for the continuance of the business by the survivors, either alone, or in partnership with the representatives of the deceased.

(E.) By the bankruptcy of any partner (*b*).

(F.) By the happening of any event which makes it unlawful for the business of the firm to

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(*a*) Act of 1890, s. 32. (*b*) *Ib.* s. 33 (1).

be carried on, or for the members of the firm to carry it on in partnership (*c*).

(G.) At the option of the other partners, if one partner suffers his share in the partnership property to be judicially charged for his separate debt (*d*).

In none of these cases is there any occasion to have recourse to the court. Moreover, by express agreement in the articles, any other circumstances, such as lunacy, physical incapacity, or even incompatibility of temper, may be made a cause for dissolution without the intervention of the court.

(2.) Judicial Dissolution.

In the absence, however, of any such agreement, it is necessary to apply to the Chancery Division of the High Court (by action and not by way of summons), in any of the following cases (*e*):

(A.) When a partner is found lunatic by inquisition, or is shown to the satisfaction of the court to be permanently of unsound mind.

(B.) When a partner, other than the partner suing, becomes in any way permanently incapable of performing his part of the partnership contract.

(C.) When a partner, other than the partner suing, has been guilty of such conduct as, in the

(*c*) Act of 1890, s. 34. (*d*) *Ib.* s. 33 (2). (*e*) *Ib.* s. 35.

opinion of the court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business.

(D.) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business, that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him.

(E.) When the business of the partnership can only be carried on at a loss.

(F.) Whenever, in any case, circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.

(3.) Comments on Both Methods of Dissolution.

The law of France is curiously like ours in regard to dissolution, providing for dissolution without the aid of the courts in some events, and requiring that aid in others. Thus, by Art. 1865 of the *Code Civil*, a *société* comes to an end automatically, (a) by the expiration of the agreed

term; (b) by the completion of the business for which it was constituted; (c) by the death of one of the partners; (d) by the renunciation of one or more of the partners where the partnership was constituted for an indefinite period. In other cases, by Art. 1871, the dissolution can only be demanded (in the words of the code translated into English) "for just motives, as when another partner breaks his engagements, or a chronic infirmity renders him unable to attend to the business, or in the like cases, the legitimacy and gravity of which are left to the judgment of the court." There is, however, one clause (Art. 1869) which seems to qualify the power of ending a partnership for an indeterminate time, viz., that the dissolving party must act in good faith, and not dissolve "*à contre temps*," which, I take it, means, in plain English, at an awkward moment, or, as Art. 1870 puts it, "at a time when the capital is not intact, and it is important to the partnership that the dissolution should be postponed."

Now, of course, in the case of a partnership at will, *i.e.*, for an undefined time, there is no necessity to invoke the aid of the court to dissolve it, although there may be to administer and liquidate the assets; for any partner can dissolve the firm for himself by a simple notice in that behalf, whether the other partner or partners be sane or of unsound mind (*f*).

(*f*) *Jones* v. *Lloyd*, 18 Eq. 265.

The function of the court as a dissolving, as distinguished from an administering, authority, is therefore practically necessary only where a partnership is for life, for a fixed term, or for a single uncompleted adventure; and not even then if the agreement or the Act provides for dissolution under the circumstances.

And, perhaps, it is convenient to mention here, that, if the articles of partnership contain a clause referring all matters in difference to arbitration, and the dispute involves a claim for dissolution, the arbitrator is empowered to dissolve just as the court might (*g*). Moreover, in such a case, if one partner brings an action for dissolution, the court may, in its discretion, stay all proceedings in the action, and refer the matter to the arbitrator (*h*); or may refuse to do so (*i*), or may appoint a receiver, or receiver and manager, and refer all other matters to the arbitrator (*k*).

Let us consider in a little more detail the circumstances which entitle a partner to dissolve without the aid of the court. And, first, with regard to the dissolution of a partnership at will, no *period of notice* is required. It can be dissolved at once, by

(*g*) *Vawdrey* v. *Simpson*, [1896] 1 Ch. 166; *Belfield* v. *Bourne*, [1894] 1 Ch. 521.

(*h*) *Ibid.*

(*i*) *Barnes* v. *Youngs*, [1898] 1 Ch. 414; *Turnell* v. *Sanderson*, 64 L. T. (N.S.) 654.

(*k*) *Pini* v. *Roncoroni*, [1892] 1 Ch. 633.

notification in that behalf given by one partner to the other or others; or as from the date mentioned in the notice (*l*).

And the notice once given cannot be withdrawn, except by the consent of all (*m*). Upon such a notice being given, if no date is named therein, the dissolution takes effect instanter, the business being thenceforth carried on merely for the purpose of winding it up.

With regard to the dissolution of a partnership by the happening of any event which make the business unlawful, examples do not often occur. But if A. and B. became partners in the business of a particular public-house, and the licence was subsequently withdrawn by the magistrates, so that they could no longer lawfully carry on business, then, no doubt, the partnership would, *ipso facto*, be dissolved, even although they had agreed to carry it on for a fixed term of which there might be many years unexpired.

So, again, partnership between "bookmakers" (I do not mean authors, legal or otherwise) are common, and at the present time are legal (*n*). But it is conceivable that a decision of the House

(*l*) Act of 1890, s. 32; *Crawshay* v. *Maule*, 1 Sw. 495.
(*m*) *Jones* v. *Lloyd*, 18 Eq 265.
(*n*) *Thwaite* v. *Coulthwaite*, [1896] 1 Ch. 496.

of Lords, or an Act of Parliament, might at any time make such a business illegal; and, in that case, there would be an immediate and automatic dissolution.

With regard to the circumstances under which the court can decree a dissolution, the lunacy of a partner is not merely a ground for dissolution at the suit of the sane partners, but also at the suit of the lunatic partner, by his next friend or committee (*o*). Moreover, a lunacy judge has power to dissolve a partnership when a partner becomes lunatic (*p*). The justice of this is obvious, for, by reason of his lunacy, he is no longer capable of taking part in the management, and keeping a check upon his co-partners; so that if he were obliged to remain a member of the firm, his capital would, and his remaining fortune might, be exposed to risks which neither he nor his friends and guardians could control.

It seems to be a pretty question whether the marriage of a female partner would enable the court to decree a dissolution at the request of her co-partners. Prior to the Married Women's Property Act, 1882, it was well settled that such a marriage dissolved the partnership. Sir Frederick Pollock thinks that that Act made it clear that marriage

(*o*) *Jones* v. *Lloyd*, 18 Eq. 265.
(*p*) Lunacy Act, 1890, ss. 116 (4), 119, 341.

would not now dissolve such a partnership, and I need scarcely say that he is much more likely to be right than I am; but I confess that I think something might be said against this view.

It is true that marriage is not an act which makes a lady permanently incapable of performing her part of a partnership contract, nor can it be considered such an act as, regard being had to the nature of the business, is calculated, in point of law (whatever it may be in point of fact), to prejudicially affect the carrying on of the concern. Nevertheless, it may be a circumstance which renders it "just and equitable that the partnership be dissolved." For it must be remembered that the status of a married woman is still widely different from that of a spinster. It is true that she can now contract, but she is not *personally* responsible, and the only relief is against her separate property, and not against that if she has taken the precaution to settle it "without power of anticipation." Consequently, in case of losses, the other partners would surely find their rights for contribution and indemnity against her considerably modified to their disadvantage. Moreover, common sense tells us that the inevitable effect would be to introduce the husband as a potential member of the firm. In the absence of judicial decision, therefore, I do not think the case can be considered altogether free from doubt.

It is impossible to specify all the acts and circumstances which would enable the court to decree a dissolution on the wide ground that it is "just and equitable"; but, of course, fraud or misrepresentation in the course of the negotiations which resulted in the partnership, would be sufficient (*q*). In that case, in addition to any claim for damages in an action of deceit (*r*), the defrauded partner is entitled:

(A) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership, and for any capital contributed by him (*s*), plus interest and costs (*t*);

(B) to a personal order for payment of such sum, together with his capital with interest, and costs (*u*);

(C) to stand, by way of subrogation, in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities (*v*) with interest (*w*);

(*q*) Lindley, 314.

(*r*) *Derry* v. *Peek*, 14 A. C. 337; *Newbegging* v. *Adam*, 34 Ch. D. 582.

(*s*) Act of 1890, s. 41.

(*t*) *Mycock* v. *Beatson*, 13 Ch. D. 384.

(*u*) *Adam* v. *Newbegging*, *supra*. (*v*) Act of 1890, s. 41.

(*w*) *Rawlins* v. *Wickham*, 1 Giff. 355; 3 De G. & J. 304.

(D) to be indemnified by the person guilty of the fraud, or making the representation, against all the debts and liabilities of the firm.

(4.) Return of Premium on Dissolution.

Somewhat analogous to this, is the case of a partner who has paid a premium to another on entering into partnership for a fixed term, which partnership is dissolved before the expiration of the term. It would obviously be unjust, in many cases, that the premium thus paid, should be retained. On the other hand, the party who pays it must be taken to have contemplated that the term might be shortened by death, or to have accepted that risk (*x*). Consequently, the rule is (*y*), that if the partnership is dissolved before the expiration of the term *otherwise than by death*, the court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract, and to the length of time during which the partnership has continued, unless:

(A) the dissolution is, in the judgment of the court, wholly or chiefly due to the misconduct of the partner who paid the premium; or

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(*x*) *Ferns* v. *Carr*, 28 Ch. D. 409.

(*y*) Act of 1890, s. 40.

(B) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

It is conceived, on the authority of cases decided before the Act (*z*), that when part of a premium is ordered to be recouped, it will be the same fraction of the entire premium as the fraction which is still unexpired of the original term. The amount is, however, discretionary, and will seldom be altered on appeal (*a*).

Where the articles contain the usual arbitration clause the arbitrator has power to order the return of part of a premium (*b*).

(5.) Points after Dissolution.

In the event of recourse being had to the court to decree a dissolution, it is not unusual, directly the action is started, for the plaintiff to move for a receiver, or sometimes for a receiver and manager. On such a motion, the judge generally asks whether, the parties being at arms length and in a state of litigation, the partnership can possibly go on; and if counsel agree that it cannot do so, an immediate decree for dissolution, with the usual accounts and

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(*z*) *Atwood* v. *Maude*, 3 Ch. App. 369.

(*a*) *Lyon* v. *Tweddell*, 17 Ch. D. 529.

(*b*) *Belfield* v. *Bourne*, [1894] 1 Ch. 521.

inquiries, is at once made, to the great saving of costs (*c*).

On dissolution, any partner may publicly notify the same, and require the other partners to concur in all proper acts for doing so (*d*). This latter provision was, no doubt, inserted in the Act, to meet the fact that the publishers of the Gazette refused to insert such notices unless signed by *all* the partners; but I believe that, recently, this practice at the Gazette office has been discontinued.

After the dissolution of a partnership for any cause *except death or bankruptcy*, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, as far as may be necessary to wind up the affairs of the partnership, and to complete transactions began but unfinished at the time of the dissolution, but not further. If the dissolution be caused by death or bankruptcy of a partner, this authority to wind up the concern devolves on the surviving or solvent partners alone, to the exclusion of the personal representatives, or trustee in bankruptcy, of the deceased or bankrupt partner.

This sanctioned, but limited agency, may nevertheless be taken away by the court if the parties fall out,

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(*c*) *Atwood* v. *Maude*, 3 Ch. App. 369.

(*d*) Act of 1890, s. 37.

or if special grounds be shewn by the personal representatives of a deceased,—or the trustee in bankruptcy of a bankrupt,—partner, either, partially, by the appointment of a receiver to get in the outstanding assets, or, wholly, by the appointment of a receiver and manager, to conduct the entire winding up. A receiver will generally (but not as a matter of course) be appointed, on the application of any partner; even although the disputes between the partners are referred to arbitration, under a clause in that behalf in the articles (*e*).

The appointment of a manager, although more common than formerly (*f*), requires a stronger case than the appointment of a receiver. A receiver merely takes the income and pays the necessary outgoings. A manager takes over and carries on the entire business. The appointment of a receiver only, practically brings the trade to a dead stop (*g*). Therefore, if it be desired to continue the trade at all, it is necessary to appoint a manager, or a receiver and manager, as he is generally called.

In partnership actions, the court will not, as a rule, appoint a manager, and so take the control out of the hands of the partners, except with the view of

(*e*) *Pini* v. *Roncoroni*, [1892] 1 Ch. 633.

(*f*) *Per Fry*, L.J., *Reid* v. *Explosives Co.*, 19 Q. B. D. 269.

(*g*) *Per Jessel*, M.R., *In re Manchester and Milford Rail. Co.*, 14 Ch. D. p. 653.

winding up the concern (*h*) by carrying into effect existing contracts, and entering into such new ones as are necessary for carrying on the business in the ordinary way, but so as not to impose, by speculative dealing or otherwise, onerous liabilities on the partners (*i*).

Where one partner is insolvent, the other partner will be entitled to be appointed receiver and manager (*k*); but, in other cases, the court will, as a general rule, not appoint any of the partners except by consent, unless the business is a personal one, or other strong grounds exist for appointing one of the partners (*l*).

The court, in appointing a manager, usually orders that he is not to act as such beyond a fixed date, without leave of the court (*m*); and he is appointed on the terms that he becomes personally liable on all contracts entered into by him, but is entitled to be indemnified out of the assets of the business (*n*).

(*h*) *Const* v. *Harris*, T. & R. p. 517; *Gardner* v. *London Chatham and Dover Rail. Co.*, 2 Ch. App. p. 212; *Sargant* v. *Read*, 1 Ch. D. 600.

(*i*) *Taylor* v. *Neate*, 39 Ch. D. 538.

(*k*) *Collins* v. *Barker*, [1893] 1 Ch. 578.

(*l*) See *Sargant* v. *Read*, *supra*.

(*m*) *Davies* v. *Vale of Evesham Preserves*, 43 W. R. 646.

(*n*) *Owen* v. *Cronk*, [1895] 1 Q. B. 271; *Burt* v. *Bull*, [1895] 1 Q. B. 276; and see *Strapp* v. *Bull*, [1895] 2 Ch. 1.

(6.) Realisation of the Assets.

A dissolution, then, having begun, whether voluntarily or under a decree of the court, and whether under the direction of the partners or the surviving or solvent ones, or of a receiver and manager, what happens next ? The answer is contained in section 39 of the Act, in the following words : " On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm, and for that purpose, any partner, or his representatives may on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm."

This right is said to be in the nature of an equitable lien existing throughout the partnership, though it does not become active until a dissolution, when it immediately attaches to what was partnership property at the date of the dissolution (*o*).

It is, in fact, a kind of floating lien, analogous to

(*o*) *Payne* v. *Hornby*, 25 Beav. 280 ; *Ex parte Morley*, 8 Ch. App. 1026.

the floating securities created by the debentures of joint stock companies, and is lost by the conversion of assets into the separate property of one of the partners (*p*). The lien is enforceable, in the absence of agreement to the contrary, by a sale of the whole of the assets (*q*); but, very generally, where a winding up of the business is not contemplated on the death or retirement of a partner, the partnership articles provide that the share of the deceased or retiring partner, shall be ascertained by reference to the last preceding annual balance sheet, so as to avoid a sale. If, however, from any cause, such an agreement cannot be substantially carried out, the court will decree a sale (*r*).

The assets include not only the stock-in-trade and book debts, furniture, tools, machinery, etc., but also an intangible, but often very valuable, property, called goodwill; and, in the absence of agreement, it must be sold (*s*).

(*p*) *Re Langmead*, 7 D. M. & G. 353; *Holroyd* v. *Griffiths*, 3 Drew, 428.

(*q*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298, 11 Rev. Reps. 77; *Wild* v. *Milne*, 26 Beav. 504; but see *Walker* v. *Hirsch*, 27 Ch. D. 460.

(*r*) *Taylor* v. *Neate*, 39 Ch. D. 538; *Downs* v. *Collins*, 6 Hare, 418. Such an agreement will be carried out even where the original term has long expired and the partnership has been carried on as a partnership at will (*Daw* v. *Herring*, [1892] 1 Ch. 284).

(*s*) *Pawsey* v. *Armstrong*, 18 Ch. D. 698; *Page* v. *Ratliffe*, 76 L. T. 63.

The word goodwill is one very difficult to define. Lord Eldon said that it was nothing more than the probability of the old customers resorting to the old place (*t*). It clearly, however, means more than that, for it often exists quite independently of locality. I think that a good working description of it would be, that it is the public approbation which has been won by the business, and that, considered as a marketable thing, it is the probability of the customers or *clientèle* of the firm resorting to the persons or person who succeed to the business as a going concern. Approbation was one of the original meanings of "goodwill" long before it was used as commercial slang. Thus Shakespeare says: "I hope I have your goodwill," and "Let me have your goodwill" I think that probably this is the derivation of the term, and that commercial men gradually converted the "goodwill" which the public manifested towards the owners of a business, into an asset of the business considered as a figurative entity. In some cases this approbation may depend on the situation of the trade premises (*e.g.*, a public-house). In others, on the quality or cheapness of the goods sold under a firm name (*e.g.*, Whiteley's business). In others, on the reputation of the business for a particular class of articles (as Humber & Co. for

(*t*) *Cruttwell* v. *Lye*, 17 Ves. 335.

cycles, or Gunter's for cooked articles). In others, partly on the personal introduction of the new man to the *clientèle* by the vendor of the business (as is the case with regard to a solicitor's or surgeon's business). As Sir George Jessel said in *Ginesi* v. *Cooper*, 14 Ch. D. at p. 599: "It is a connection formed by years of work" (*u*), or, in the words of the present Master of the Rolls: "A benefit arising from connection and reputation."

The value of the goodwill of a dissolved partnership is considerably decreased by the rule laid down in the recent case of *Trego* v. *Hunt*, [1896] A. C. 7 (*x*), namely, that the sale of the goodwill does not prevent the partners from carrying on a competing business with the purchaser. It is true that the quondam partners may be restrained by injunction from *soliciting* any person who was a customer of the old firm (*y*), or from representing themselves as continuing the old business. Still, the mere fact that they may compete is a serious factor in the case, and cannot fail to affect the saleable value of the firm's goodwill.

(*u*) See also *Churton* v *Douglas*, 28 L. J. Ch. 841; *Stewart* v. *Gladstone*, 10 Ch. D. 626; *Ex parte Punnett*, 16 Ch. D. 226; *May* v. *Thomson*, 20 Ch. D. 705.

(*x*) Followed, *Jennings* v. *Jennings*, [1898] 1 Ch. 378.

(*y*) Inapplicable where the firm is bankrupt, and the sale of goodwill is made by the trustee in the bankruptcy (*Walker* v. *Mottram*, 19 Ch. D. 355).

I may perhaps mention, that this principle is equally applicable to the case where a person has been taken into partnership, on the terms that, on the expiration of the partnership, the goodwill shall belong exclusively to the other partner (*z*); and also to the case where, on the dissolution, one partner purchases the assets from the others (*a*).

If the goodwill be not sold, each partner may not only canvass old customers, but (subject to any question as to endangering the other partners under the doctrine of "holding out") may also use the firm name (*b*).

It would seem that where (as in some professional partnerships) one of the partners holds an appointment or office, the emoluments of which have been treated as profits of the firm, he must, on dissolution, in the absence of agreement to the contrary, be debited with its value. For although such an office cannot be *sold* for the benefit of the firm, yet, if one of the partners retains it, he must account for its value (*c*).

(*z*) *Trego* v. *Hunt*, [1896] A. C. 7.
(*a*) *Jennings* v. *Jennings*, [1898] 1 Ch. 378.
(*b*) *Levy* v. *Walker*, 10 Ch. D. 436.
(*c*) *Smith* v. *Mules*, 9 Ha. 556.

(7.) Final Settlement of Accounts and Distribution of Assets.

The partnership being dissolved, and the assets realised, the next thing that requires notice is the final account and distribution of the assets.

Of course, where, by agreement, one or more members of the firm continue the business on the terms of paying off the share of the outgoing or deceased partner or partners, ascertained on a certain agreed basis, no final account and distribution is necessary, because the agreement is substituted for it. But where there is a true dissolution of the firm, each partner going his own way and the partnership property being sold, then a general account is necessary, and may be claimed, not only by living partners, but by the representative of deceased ones, and even by the transferees of the shares of living ones. Such an account will start from the last settled account, *i.e.*, in ordinary cases, on the footing that the last balance sheet is correct; for the court will never (unless for some proved fraud or error) disturb a settled account. Of course there are, occasionally, cases where a partnership has lasted for years without any settled balance sheets, and in such cases it is necessary to take the accounts from the very beginning.

However, from whatever date the final account is to begin, it must, in every case, be thence continued

right down to the date of the dissolution, and then must be kept open so as to let in all transactions occurring in the actual winding up. In taking the accounts, the uniform course of practice of the firm with regard to previous accounts, must (so far as applicable to the final account) be observed. No doubt in complete dissolutions this is not often of much importance; but where an account is taken to ascertain what is due to a partner who has died or retired on the terms of receiving the value of his share at the date of death or retirement, it may be of the utmost importance. The case of *Ex parte Barber*, (5 Ch. App. 687,) shews this very clearly (*d*). There, partnership articles provided for a balance sheet being made out up to the 31st of December in each year, which, after a certain time, was to be binding on the partners, except that manifest errors, when discovered, should be corrected. It was also provided, that a like account should be made out on the 31st of December next after the death of a partner, and that his executors should be entitled to receive, by six instalments, from the surviving partners, the value of his interest as appearing from such balance sheet. The uniform practice of the firm in making out their balance sheets, was to treat the loss occasioned by any asset turning out bad, as attributable to the year in which it was discovered to be bad. In

(*d*) See also *Stewart* v. *Gladstone*, 10 Ch. D., at p. 660.

the year 1864 one of the partners died; and after the balance sheet had been made out, various assets which had been treated as good were ascertained to be irrecoverable, owing to the failure, since the 31st of December, of debtors to the firm, and depreciation of consignments, which, when the balance sheet was made out, had not been realised. It was held that the executors of the deceased partner were nevertheless entitled to receive the value of his share as appearing by the balance sheet, without any deduction for the losses subsequently ascertained.

Difficulties not infrequently arise where the executors of a deceased partner are the same persons as the surviving partners. In such cases it is exceedingly dangerous for them to wind up the concern without the assistance of the court; for, unless they act in strict accordance with the law, their settlement of the affairs of the firm are always liable to be upset by the persons beneficially entitled to the estate of the deceased partner (*e*).

Where, however, the surviving or continuing partners have, by the partnership agreement, an option to purchase the interest of a deceased or outgoing partner, section 42 (2) of the Act declares, that if they exercise the option, and comply with the

(*e*) See *Wedderburn* v. *Wedderburn*, 2 Keen, 722, and *Beningfield* v. *Baxter*, 12 A. C. 167.

terms thereof in all material respects, their liability shall be *that imposed upon them by the agreement*; and they will not be liable to account for subsequent profits, even although one or more of the partners is an executor or trustee of the deceased partner.

On the other hand, if the surviving or continuing partners, having such an option, either assume to exercise it, but do not in all material respects comply with its terms, or, having no such option, they neglect to come to a formal settlement of accounts with the retired partner or the executors of the deceased (as the case may be), the latter have the option of claiming either five per cent. interest on the amount of their share in the assets, or such a share of profits, since the dissolution, as the court may consider to be fairly attributable to the use of their share of the assets (*f*). But, in arriving at this, some allowance ought to be made to the surviving or continuing partners for their services (*g*), unless they be the trustees or personal representatives of the deceased (*h*).

I may mention here, that, under arrangements for paying out the share of a deceased or outgoing partner, the amount is a debt accruing at the date

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(*f*) Act of 1890, s. 42 (1), (2).

(*g*) *Brown* v. *de Tastet*, Jac. 284, *Mellersh* v. *Keen*, 27 B. 236.

(*h*) *Stocken* v. *Dawson*, 6 Bea. 371.

of the dissolution, and the Statute of Limitations begins to run from then (*i*).

Upon a dissolution (in the strict sense of the term) the following rules apply, unless modified by agreement (*k*) :

"(a.) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share in the profits :

"(b.) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order :

"1. In paying the debts and liabilities of the firm to persons who are not partners therein :

"2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital :

"3. In paying to each partner rateably what is due from the firm to him in respect of capital :

"4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible."

When a partnership is being wound by up the court,

(*i*) Act of 1890, s. 43; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474.

(*k*) See *Wood* v. *Scoles*, 1 Ch. App. 369.

I need scarcely say that lawyers' bills are incurred, both by the plaintiff and defendant; and the question then arises as to how these costs are to be borne. The answer is, that they must be treated as a deferred liability of the business. They are costs of administration; and, just as the costs of administering a trust fund come out of that fund after payment of debts, before either capital or income is distributed among beneficiaries, so, in administering the assets of a partnership, the costs of administration must be discharged before either capital is repaid to, or profits divided between, the partners. But, although it is a liability of the business—a trade charge—it is a *deferred* liability, and can only rank after the firm's debts; for it would be obviously unjust that the creditors of the firm should be obliged to contribute to the cost of litigation between the partners. Moreover, one who has advanced money to the firm is none the less a creditor for this purpose, because he also happens to be a member of the firm. Consequently, where one of the partners has made *advances* to the firm (as distinguished from contributing capital for the joint adventure), such advance must be repaid to him in priority to any claims for costs; for he claims such advance *quâ* creditor, and not *quâ* partner (*l*)—*quâ* debt, and not *quâ* capital.

(*l*) *Austin* v. *Jackson*, 11 Ch. D. 942 n.

Per contra, where a partner owes money to the firm (*e.g.*, where he has overdrawn his share of profits) he cannot claim his costs until he has made good the debt due to the partnership estate (*m*), a principle equally applicable in the administration of a trust. In short, he has in his hands, what is really and truly a part of the assets of the partnership; and although it is quite true that he is entitled to his costs, the other partner has a right to say to him "pay your own costs out of that portion of the assets which you have drawn out in excess of my drawings, and which you have in your hands" (*m*).

Lastly, assuming that the assets, administered in the order which I have named, are insufficient to pay the costs of the action, or to pay them in full, what then? In that case, remembering that such costs are liabilities of the firm (although deferred liabilities), it follows that they must be borne, like all other liabilities which the assets are insufficient to meet, by the partners, in the proportion in which they have to bear the general losses. So that in the result, the greater part of the solicitor's bill of a partner who takes a small interest in the concern, may have to be paid by the partner who vainly hoped to take a large interest in the profits, and who, therefore, impliedly undertook a correspondingly

(*m*) *Ross* v. *White*, [1894] 3 Ch. 326.

heavy responsibility for the losses. Our venerable Lady Equity, who concerns herself almost exclusively with upholding private proprietary rights, thus shows herself on occasion, and under cover of the maxim *qui sensit commodum debet sentire et onus*, as socialistic in distributing the burden according to the ability to bear it, as the London County Council, or Mr. Karl Marx himself.

LECTURE VI.

THE INSOLVENCY OF ALL OR SOME OF THE PARTNERS.

I HAVE hitherto assumed that where the assets of the partnership are insufficient to meet the liabilities, yet, all the individual partners are solvent. In that case no questions can arise between the firm's creditors and the private creditors of the partners; they are all paid, and, in taking the partnership accounts, the joint debts, thus paid, will be adjusted in accordance with the terms of the partnership in relation to the bearing of losses.

But where a partnership business fails, it not infrequently happens that the loss is greater than one or more, or perhaps all of the individual members of the firm, can bear. A partner too often puts all his eggs into the partnership basket—stakes his fortune on the success of the business—thinking, as Shakespeare puts it:

> "If like an ill venture it comes unluckily home,
> I break, and you, my gentle creditors, lose."

But even where he still retains some property beyond that which he has contributed to the capital

of the firm, yet if that private property proves insufficient to meet his share of the losses and also his private debts, he will be insolvent.

Now, so far as an insolvent partner is *personally* concerned, it is necessarily a matter of small moment to him how his private property (as distinguished from his share in the firm's assets) is administered. *Væ victis*: He, at least, will be bereft of everything, and his only interest in the matter will be that of a captive watching with melancholy interest the quarrels of his captors over the distribution of the spoils.

But although it may be a matter of indifference to him, personally, how his estate is distributed between his private creditors on the one hand, and, either the creditors of the firm, or his solvent partners (who may have had to pay more than their share of the losses), on the other, it is by no means a matter of indifference to members of those classes, whose interests are obviously conflicting. Upon what principle, then, are these conflicting interests to be adjusted?

For the sake of lucidity it is necessary to separate this question, and to consider (1) the principle as between the creditors of the firm and the creditors of the individual partners, where both are bankrupt; and (2) the principle as between the creditors of the individual bankrupt partner and his solvent co-partners.

(1.) Proofs against the Joint and Separate Estates where all the Partners are Insolvent.

Apart from the actual law, many reasonable methods might be suggested of distributing the joint and separate estates where all the partners are insolvent. For instance, it seems to have been considered, in Lord Hardwick's time, that, for this purpose, the firm and the individual partners ought to be treated as separate persons altogether—that the firm's creditors might prove against the estate of the individual bankrupt, and that the separate creditors of the individual partners might prove against the estate of the firm (*a*).

Again, in Scotland, at the present day, each firm creditor values the dividend which he considers he will get from the firm's assets, and then proves against the partners' separate estates for the balance.

In Switzerland, on the other hand, the firm's creditors take the whole of the assets, and in addition are allowed to prove for the deficit *pari passu* with the private creditors.

However, none of these methods of adjustment now prevail in England; for since 1770, at least, the

(*a*) See judgment of Lord Blackburn, *Read* v. *Bailey*, 3 A. C. 102.

rule has been established that the creditors of a bankrupt firm cannot prove against the separate estate of the individual partners in competition with the private creditors of such partners, nor can the creditors of a separate partner prove against the joint estate of the firm in competition with the firm's creditors; but that after 20*s.* in the £ have been paid to either class of creditors, then (and not before) the other class may so prove. The reason of the rule is obscure, but Lord Blackburn, in *Read* v. *Bailey*, 3 A. C. at p. 102, seemed to think that it was adopted "not upon the ground that there was a right in the private creditors to be paid out of the separate estate, or a right in the joint creditors to be paid out of the joint estate, for I do not think that there was any such rule; but it was said the rule was to be adopted, partly at least, on the ground of convenience in administering the bankruptcy law. It was thought that the administration of the bankruptcy law could not be conveniently carried out if the estates were to be mixed."

Anyhow, whatever the origin of the rule may have been, it has not only been well settled for a long time (*b*), but is now crystallized in section 40,

(*b*) See *Lodge* v. *Prichard*, 1 D. J. & S. 610; *Rolfe* v. *Flower*, L. R. 1 P. C. 27; *Ex parte Morley*, 8 Ch. App. 1026; ***Ex parte Dear***, 1 Ch. D. 514.

sub-section (3), of the Bankruptcy Act, 1883, in the following words (*c*) :

"In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate."

Moreover, the rule is not confined to cases of distribution under a bankruptcy, but equally applies to the case of the administration of the assets of deceased partners (*d*).

But although the broad general principle is that which I have stated, it is subject, like most legal principles, to exceptions, viz. :

(1.) Where there is no joint estate, the joint and separate creditors prove against the separate estate *pari passu*.

(2.) Where a person has been defrauded by the partners, or by any of them under such

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(*c*) *Cf.* Indian Contract Law, section 262, which is to the same effect.

(*d*) *Ridgway* v. *Clare*, 19 Bea. 111 ; *Lodge* v. *Prichard*, 1 D. J. & S. 610 ; Judicature Act, 1875, s. 10.

circumstances as render the firm liable, he may, at his election, prove either against the separate estate of the partners who were privy to the fraud, or against the joint estate.

(3.) Where a creditor of the firm has also a distinct contract for the same debt with the individual partners, or some of them, he may prove both against the firm estate and the separate estate.

(4.) Where a creditor of the firm has obtained an order adjudicating one of the partners a bankrupt, there is authority for saying that he may prove in competition with the separate creditors of such bankrupt.

(5.) Where a partner has fraudulently converted to his own use part of the property of the firm, and his fraud has not been ratified, the firm's trustee in bankruptcy may prove for the value of such property in competition with his separate creditors. And, in the converse case, the trustee in bankruptcy of the separate creditor may prove against the joint estate.

(6.) Where one or more partners have carried on a distinct trade, with a distinct capital, in respect of which they have become either debtors or creditors to the firm in the ordinary way of trade, the respective

trustees in bankruptcy can prove as if the two concerns were composed of distinct individuals.

(1.) With regard to the first of these exceptions, it is not easy to see the reason for it. It would seem, however, from the judgment of Lord Loughborough, in *Ex parte Elton* (3 Ves. 240), that the reason for the main rule being, that where there are two funds available for distribution among creditors, a creditor will not be allowed to attach himself to one, to the prejudice of those who have no other fund, it follows that where there is only one fund, the whole foundation of the main rule is gone, and, consequently, that all the creditors (whether joint or separate) can prove *pari passu* against that fund. This reasoning, however, does not seem to be very conclusive, particularly as it has always been held that the existence of even a scintilla of joint estate (such as office furniture) is enough to negative the exception. However it appears to be still law (*d*).

(2.) The second exception seems to rest on the principle that the fraud is the fraud of the individual partners, who concocted it, and that their several liability is not abridged because the firm happens also to be responsible; a principle which, I apprehend, is also the foundation of the rule that the ordinary liability of partners for torts is joint and

(*d*) Bankruptcy Act, 1883, s 37 (1)

several. It is true, no doubt, that demands in the nature of *unliquidated damages*, arising otherwise than by reason of a contract, promise, or breach of trust, are not provable in bankruptcy (*d*); but where a wrongdoer has cheated another out of property which cannot be traced and restored, Courts of Equity have, for a long period, allowed the latter to prove for the value *as an equitable debt* (*e*). As *James*, L.J., said, in *Ex parte Adamson*, 8 Ch. D. 807, 820: "Some doubt was suggested in the course of the argument whether proof could be made in bankruptcy for a fraud, any more than for other torts. A great many cases—if cases were necessary—show that proofs have been allowed in bankruptcy for fraud, and on the ground of fraud only, where, on a mere breach of contract, they would not have been admitted. A notable instance of this is in the proof allowed in *Read* v. *Bailey*, 3 App. Cas. 94, by the joint estate against the separate estate, for moneys fraudulently abstracted from the partnership assets, a decision which only followed a whole line of recognised authorities. But, in truth, the proof is not for the fraud or for the tort. The Court of Chancery never entertained a suit for *damages* occasioned by fraudulent conduct or a breach of trust. The suit was always for an equitable debt, or liability in the nature of debt.

(*d*) Bankruptcy Act, 1883, s. 37 (1).

(*e*) See *Moore* v. *Knight*, [1891] 1 Ch. 547.

It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party has been cheated. If a man had been defrauded of any money or property, and the cheater afterwards became bankrupt, if the money could be earmarked, or if the thing could be found in specie or traced, the assignees, or trustees, were made to give it back; *or, if it could not be earmarked or traced, then proof was allowed against the estate.* It is a mere accident, but a frequent accident, that the fraud is connected with a partnership; but where it is, the result often is that the partnership, in its joint character, is liable for it. . . . But this right to go against the partnership assets did not relieve the guilty party, or parties, of his or their personal and separate liability by reason of his or their actual participation. If, in a partnership of A., B., C., and D., and in a partnership matter, A. and B. shared in a fraud upon a customer, they would be severally liable, and the joint estate would be liable to make restitution, but not the separate estates of C. and D.; and the rule about joint and several liability must be read with this qualification. But, so qualified, the rule is a well-established rule." The party defrauded is not, however, entitled to go against the joint estate *and* the separate estate, but has to make his election.

(3.) The third exception to the general rule (that

the joint creditors can only prove against the joint estate, and the separate creditors against the separate estate) occurs where a creditor has distinct contracts *for the same debt*, with the firm as a firm, and with each of the partners individually. In such cases (herein differing from the last exception), he can, now, prove against and receive dividends from *both* estates, so long, of course, as he does not get more than 20*s.* in the £. This right is statutory, being given by Article 18 of Schedule 2 to the Bankruptcy Act, 1883 (which is merely a re-enactment of the former statute) in the following words :

"If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as a member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts."

The case of *Ire Honey*, 7 Ch. App. 178, is a good instance of this exception. There, a joint and several promissory note was signed (1) by two members of a firm ; (2) by the firm as such ; and (3) by several other persons. The firm having

become bankrupt, the holder of the note carried in proofs against the joint estate of the firm, and also against the separate estates of the two partners who had signed the note; and it was held that the holder was entitled to prove against, and receive dividends from all three estates.

In giving judgment, *Mellish*, L.J., said: "It appears to me, that a joint and several promissory note, though it is one instrument, contains both a joint contract, and distinct separate contracts, by the several makers. It seems to me, therefore, to be within the plain meaning of the words of this section; and the only conclusion I can draw is, that it was the intention of the legislature that, wherever there was a joint and several contract, and joint and several estates being administered in bankruptcy, the creditor should be entitled to prove against both the joint and separate estates."

(4.) The next exception is somewhat peculiar, viz., that where a joint creditor of the firm takes effective proceedings in bankruptcy against one of the partners, he is allowed to prove against the separate estate of that partner in competition with the separate creditors. The reason given in the authorities, is, that it would be inequitable for the separate creditors to take advantage of the bankruptcy proceedings, and yet to exclude the author of them. It

is, however, questionable whether this exception is not now obsolete (*e*).

(5.) The reason for the fifth exception to the rule is stated very clearly, by Lord Blackburn, in *Read* v. *Bailey*, 3 A. C., at p. 102, as follows: "Upon that rule (that is, the main rule as to joint and separate estates), there has been established an exception. The first case, which has been distinctly cited, in which the exception is referred to, is *Fordyce's Case* (*f*) in 1774, rather more than one hundred years ago. In that case, the decision was, that where the firm was not a creditor of a partner, in consequence of a contract made between the firm and the partner, but was so in consequence of a fraudulent conversion by the partner, the firm might prove against the separate estate in competition with the creditors of the individual partner. Now, let us see what the reason for thus departing from the rule was. The *rule* was, I have no doubt, founded partly upon the notion that otherwise there would have been a tendency to fraud, and that pretended contracts would be made with a view to a fraud upon the bankruptcy laws, if a firm were permitted to prove against the separate estate of a partner. That reason, of course, would not apply where there

(*e*) Robson's Bankruptcy, 7th ed. 723, note (*l*).

(*f*) 1 Cooke, B. L. 562, before Lord Bathurst. see *Lodge* v. *Fendal*, 1 Ves. J. 166.

was no contract at all, and where the right to claim arose not from a contract, but from a wrong—from a tort, a matter in which one of the parties was no sharer in the transaction at all. The other reason,—the reason which seems to have been relied upon by Lord Thurlow, namely, that there would be difficulty in following it out, and that there might be a practical inconvenience in checking the accounts,—would probably not apply in a case of that sort, which was a purely exceptional case. However that might be, in 1774, there was this exception brought in, that although the joint estate could not prove against the separate estate in competition with the separate creditors, nor the separate estate prove against the joint estate in competition with the joint creditors in cases where the liability ought to be proved arose from the contract, yet where it did not so arise, it might."

(6.) The sixth exception is stated in the head note to the case of *Ex parte Cook* (*ff*), as follows: "Where one member of a firm who carries on business on his separate account, supplies goods to the firm, and a commission issues against the firm [*i.e.*, the firm becomes bankrupt], the debt is provable; but not so for money advanced." The principle on which the exception turns, seems to be that, as between the creditors of two distinct trades,

(*ff*) Mont. 228.

it is for the benefit of commerce to consider the trades as distinct, and to neglect the fact that some or one of the partners in one, may also be partners in, or the sole owner of, the other. As Lord Eldon, however, remarked in *Ex parte Sillitoe* (*g*), the question what is a "dealing in a distinct trade," is always to be looked at with great care. Thus, where a banker is also partner in a firm of merchants who keep their current account with him, his creditors cannot prove for the overdraft of the mercantile firm in the latter's bankruptcy; for the true nature of such a case is not that of two distinct trades, but of one partner financing the firm (*gg*).

(2.) Proofs by Solvent Partners against the Estate of Bankrupt Co-partner.

So much for the law with regard to the administration of the joint and the separate estates of the partners, where all the partners are bankrupt. Let us now turn to the consideration of the case, where one or more of the partners is solvent, so that, even although the assets of the partnership may be insufficient to pay the liabilities, the firm is saved from *immediate* bankruptcy at all events, by the solvent partner personally keeping down current liabilities—not necessarily paying them all off,

(*g*) 1 Gly. & J. 383.
(*gg*) *Ex parte Maude*, 2 Ch. App. 550.

because, having regard to credit, and to the fact that there might be unmatured negotiable instruments outstanding, that might be unnecessary—but paying the current liabilities as they arise. In such a case, what are the rights of such a solvent partner against the separate estates of the bankrupt partners? Can he prove for the sum which they ought to have contributed to the partnership losses (including losses of capital), in competition with their separate creditors; or is he in the same position with the creditors of the firm, for whose debts he is personally responsible, and who, under the general rule which we have been considering, are forbidden to prove in competition with the separate creditors of his bankrupt co-partners?

Now, there is a broad general rule, that a partner cannot prove against either the joint estate, or the separate estate of his co-partner, *until all the partnership liabilities are discharged.* But this rule was not invented for the benefit of the separate creditors, to whom the solvent partner owes no duty, but for the benefit of the joint creditors who have not only a primary claim on the joint estate, but also a contingent claim on the separate estates, in the event of there being a surplus after the separate creditors have received 20*s.* in the £. If, however, there are *no* joint creditors—if, in other words, all the joint creditors have been paid by the solvent partner,

or, if the separate estate is *clearly* insolvent (*h*), so that the joint creditors cannot possibly resort to it, —then the reason of the rule is inapplicable, and *cessante ratione cessat lex.* Therefore, in such a case, the solvent partner (in addition to his lien on the partnership assets (*i*) is allowed to rank as a creditor against the separate estate of the insolvent, in competition with the separate creditors, of whom he is in fact one (*j*). At first sight, this seems open to criticism, for, if the joint creditors cannot compete with the separate ones, why should the solvent partner who pays them off, be in any better position. Ought he not merely to stand in their shoes by way of subrogation? I think that the true answer to such criticism is, that the doctrine of subrogation does not apply. There are no longer any joint creditors. The true relation of the parties is that of debtor and creditor, of a claim by a *del credere* agent against his bankrupt principal, partly for moneys paid for him, partly for moneys due to the agent under the contract of agency. The rule, however, depends entirely on there being no outstanding joint liabilities, or, in the alternative,

(*h*) *Re Levey*, 4 D. J. & S. 551; *Ex parte Sheen*, 6 Ch. D. 235.

(*i*) *Ex parte Powell*, 75 L.T. 143.

(*j*) *Ex parte Watson*, 4 Mad. 477; *Ex parte Carpenter*, Mont. & McA. 1; *Wood* v. *Dodgson*, 2 M. & S. 195; *Ex parte Plowden*, 3 M & A. 402; *Re Head*, [1894] 1 Q. B 638.

on the separate estate being clearly insolvent; and where the firm's debts have not been fully paid, and it is doubtful whether the separate estate will not pay 20*s.* in the £ to the separate creditors, no partner can prove against the separate estate of the bankrupt, except in three cases, viz.:

(1.) Where the claim arises out of a fraud committed by the bankrupt which has not been condoned.

(2.) Where the bankrupt, either alone or with others, has carried on a distinct trade, which, in the ordinary course of business, has become indebted to the partnership; and

(3.) Where a partner has been discharged from liability for the joint debts, and has subsequently become a creditor of the firm, in which case he may prove against the firm's assets.

Let us examine these three exceptions a little more closely. With regard to the first, if Smith fraudulently induces Jones to enter into partnership with him, and to pay him a premium for the privilege, then, upon Smith becoming bankrupt, Jones may prove against his separate estate for the return of the premium, notwithstanding that the debts of the firm remain unpaid (*k*). It is not easy

(*k*) *Ex parte Lodge & Fendal*, 1 Ves. Jun. 166; *Hamil* v. *Stokes*, 4 Pr. 161; *Bury* v. *Allen*, 1 Coll. 589; *Ex parte Harris*, 2 V. & B. 210.

to understand the principle of this exception, as the defrauded partner is as much competing with his own creditors (*i.e.*, the creditors of the firm), as if his claim arose *ex contractu*; and as the creditors of the firm were no parties to the fraud, it is difficult to see why they should be made to suffer. However, the principle appears to be that the equity which the partners owe to the joint creditors not to compete with them, only applies to debts owing between the partners *inter se*, and not to claims in the nature of fraud or breach of trust.

Indeed, the same principle applies where the claimant is solvent, as where the claimant is insolvent, and the question arises between his creditors and the firm's creditors. And if, in the latter case (as I have already shown), it is just that the separate creditors of a defrauded partner should be able to prove against the separate estate of the party guilty of the fraud, so as to restore to his separate estate the amount which has been fraudulently withdrawn from it, it is equally just where the defrauded one remains solvent.

It is said that the case holds equally good where the firm, as such, is bankrupt, in which case a defrauded member of the firm may prove against the joint estate. It is, however, difficult to see how a partner can remain solvent when the firm is bankrupt, as the latter event seems to presuppose that

the partners cannot jointly and severally meet the firm's liabilities. Such cases, therefore, always (or nearly always) result in disputes between the respective creditors of the joint estate and the several separate estates, which were considered in the first part of this lecture.

With regard to the second exception, viz., that a solvent partner may prove against the separate estate of a bankrupt partner, where the latter has carried on privately a distinct and separate trade, and the debt has been incurred in the ordinary course of the business of that trade, the principle has already been discussed in considering the respective rights of the creditors of such distinct firms when both are bankrupt.

The third and last exception, viz., that where one of the partners has been discharged from liability for the firm's debts, he may prove for a debt which afterwards becomes due to him from the firm, is somewhat peculiar. For instance, a partner in a bankrupt firm, obtains his discharge, and afterwards becomes the indorsee of bills of exchange on which the firm is liable. The fact that he was a member of the firm, does not preclude him from proving for the amount of the bills, his right to which only accrued after his discharge (*l*). It would seem that

(*l*) *Ex parte Atkins*, Buck, 479.

the same principle would *à fortiori*, apply, where the bills were accepted by another partner and not by the firm.

It need scarcely be pointed out, that where a person has allowed himself to be "held out" as a partner, then, in addition to becoming liable to the creditors of the concern, he is also in the same position as an actual partner, with regard to proving against the joint estate or separate estates (*m*).

The rule that partners cannot prove either against the joint or separate estates, so long as there are partnership liabilities outstanding, has been extended to the case of a person who lends money to a trade or a firm upon the terms of receiving a share of the profits, or interest the rate of which varies with the profits; and also to the case of a person who sells the goodwill of a business in consideration of a share of the profits. In such cases, although the lender or the vendor of the goodwill (as the case may be) is not a partner, yet, by section 3 of the Act of 1890, he is not to be entitled to recover anything in respect of his loan, or his share of profits, in the event of the bankruptcy or insolvency of the borrower, or purchaser of the goodwill, until all the claims of the other creditors for valuable

(*m*) *Ex parte Hayman*, 8 Ch. D. 11. But *Cf. Ex parte Sheen*, 6 Ch. D. 235, where the "holding out" was only *quâ* particular creditors, and the decision was *contra*.

consideration in money, or money's worth, have been satisfied (*n*).

At first sight, that section seems to make the lender's security entirely dependent on the success of the business, and thereby to practically make him liable for its losses to the extent of his loan, and, in fact, to place him somewhat in the position of a shareholder in a limited company. However, that is not the true construction of the section. All that it means is, that he cannot rank with the other creditors as a mere creditor; but if he has been wise enough to get a collateral security for his loan, then the section in no way prejudicially affects that collateral security. For instance, in *Badeley* v. *The Consolidated Bank* (*o*) (to which I have already referred), the lender took, by way of collateral security for his loan, certain shares and debentures belonging to the borrower. It was urged that, even if there was no partnership created between lender and borrower, yet, under the fifth section of Bovill's Act, the lender could not recover his loan until all the other creditors were paid, even by realising the shares and debentures which he held as security. The court were clearly of opinion that he could.

(*n*) *Ex parte Jones*, [1896] 2 Q. B. 484, and *Re Fort*, [1897] 2 Q. B. 495 (where no agreement in *writing*). But *cf.* *Re Vince*, [1892] 2 Q B. 587.

(*o*) 38 Ch. D. 238; and see also *Ex parte Sheil*, 4 Ch. D. 789.

The present Master of the Rolls said:—"Supposing that a person lends money upon mortgage of real estate, and stipulates that he is to have a share in the profits of some business, is it to be supposed that that mortgagee could not bring an ejectment to recover his security because of the fifth section of Bovill's Act? It is too absurd. That is not recovering his principal and interest. It is very true that, unless he gets his security, he may lose the fund out of which it is to be repaid, but such a case as that is not within the section at all." It appears, therefore, that all that is meant by the fifth section is that the lender loses his right of proof, but does not lose any security which he may possess.

Here these lectures must end. Need I say that they are but a broad sketch giving only the most salient features of the subject. For the finished picture, with its wealth of detail, you must turn to the elaborate work of Sir Nathaniel Lindley. But although a sketch is necessarily a humble work, like other humble things it has its uses. By excluding complex details, it accentuates and brings into greater relief those principal features of the landscape upon which its character depends. So in law lectures, if one can generalize the "wilderness of single instances" which are embalmed in the reports, and extract from them some broad principles, the

work will not be altogether useless. To do this has been my constant endeavour, not only here but in such unconsidered trifles of mine as have hitherto been published. In short, in the words of Lord Bacon, I have endeavoured "rather to excite your judgment briefly than to inform it tediously." In conclusion, I must thank you for giving me so patient a hearing, and trust that you do not secretly apply to me the advice which the old "Spectator" gave to the country clergy of his time who would insist on writing their own sermons, viz., that "instead of wasting their spirits in laborious compositions of their own, they would endeavour after a handsome elocution, and all those other talents that are proper, to enforce what has been penned by greater masters" which "would not only be more easy to themselves but more edifying to the people."

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